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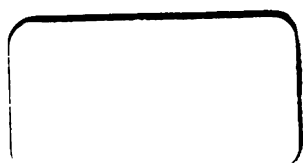
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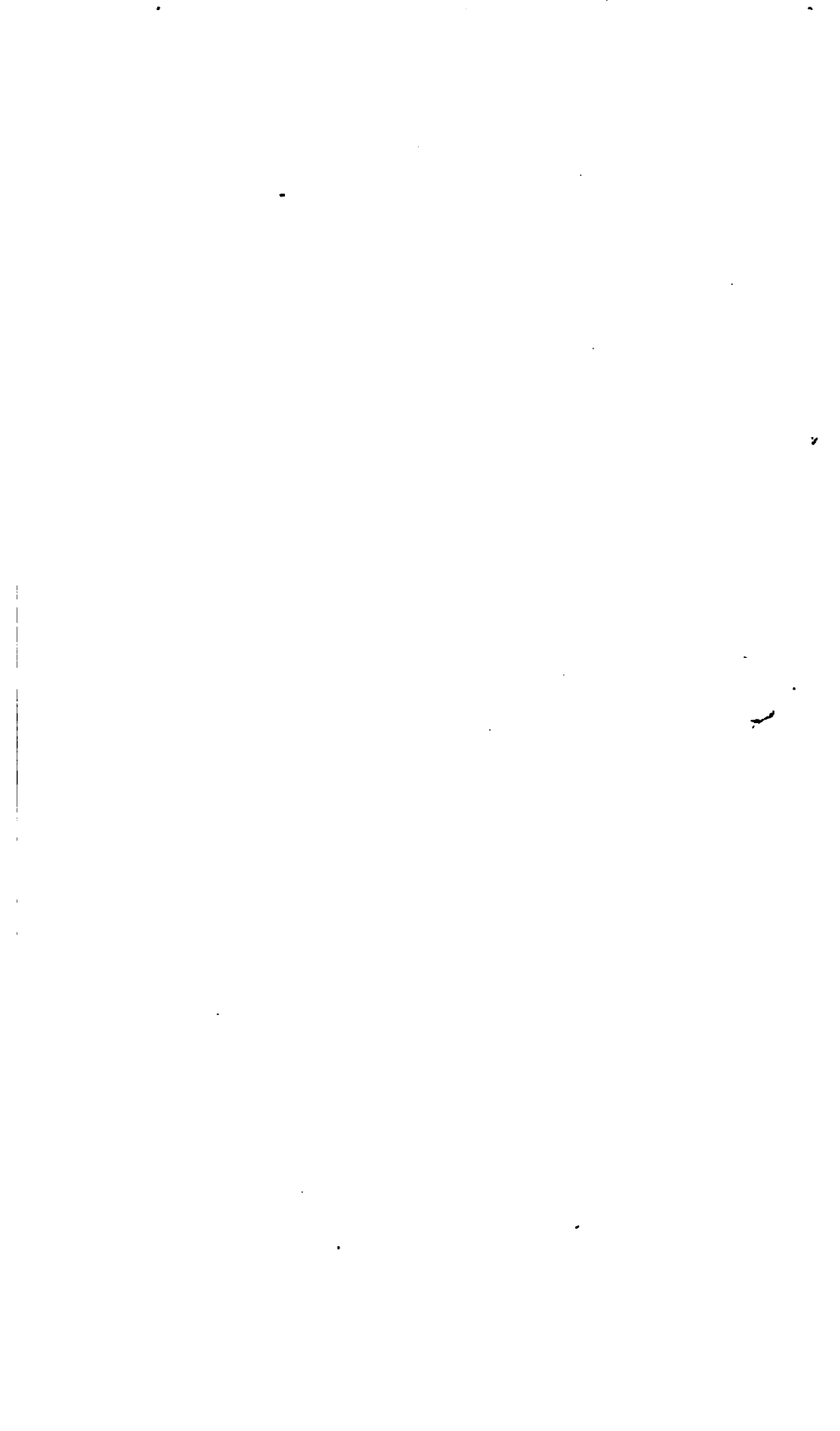
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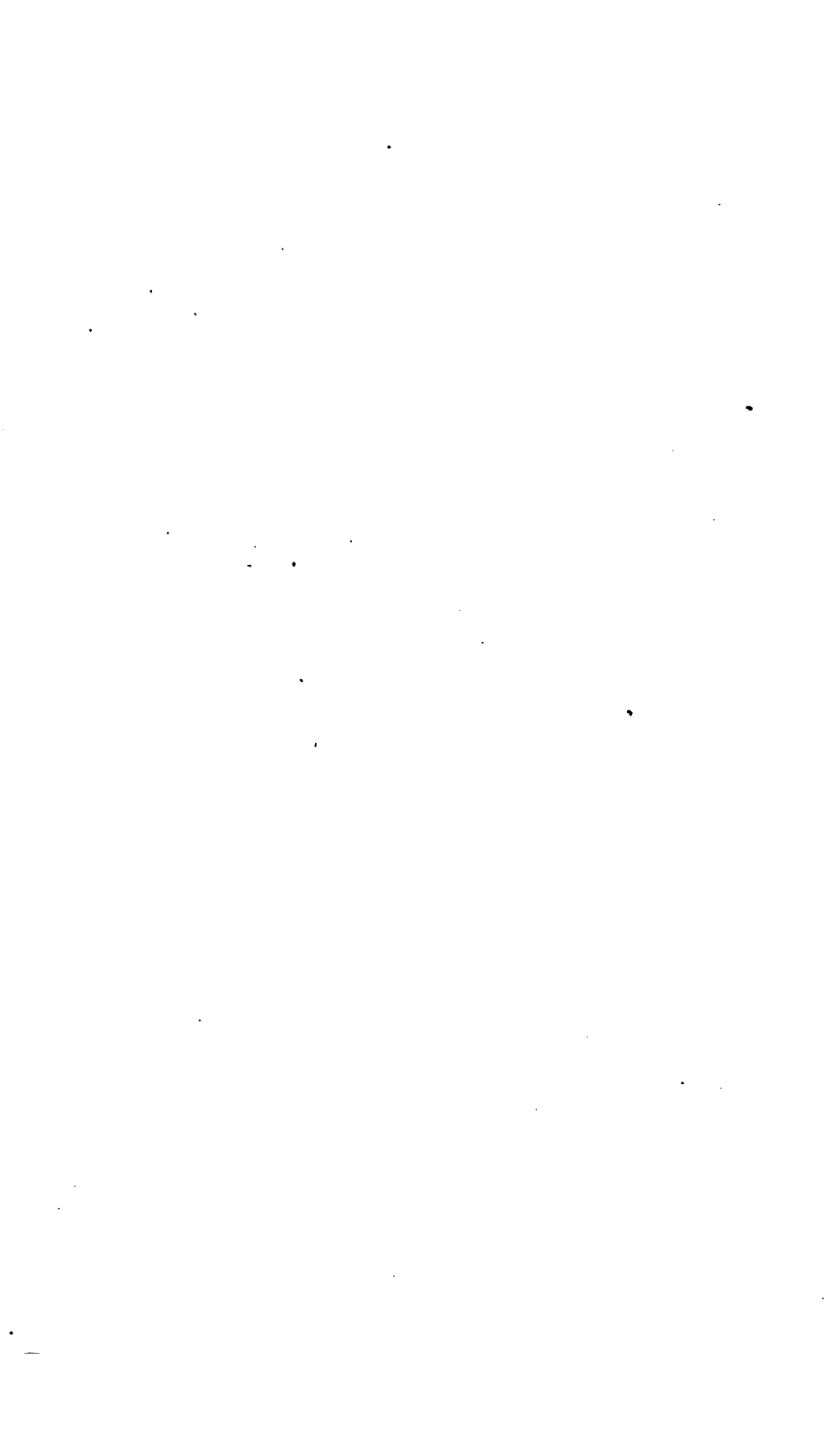




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OF THE
LAW OF REAL PROPERTY.



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PRINCIPLES
OF THE
LAW OF REAL PROPERTY,

INTENDED AS
A FIRST BOOK
FOR
THE USE OF STUDENTS IN CONVEYANCING.

BY THE LATE
JOSHUA WILLIAMS,
OF LINCOLN'S INN, ONE OF HER MAJESTY'S COUNSEL.

The Seventeenth Edition

RE-ARRANGED AND PARTLY RE-WRITTEN

BY HIS SON,
T. CYPRIAN WILLIAMS,

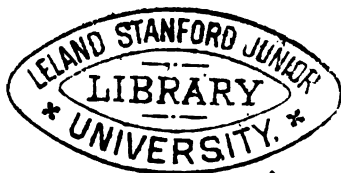
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PREFACE

TO THE SEVENTEENTH EDITION.

THE present work is put forward as the seventeenth edition of the late Mr. Joshua Williams's "Principles of the Law of Real Property": but it is right to explain that it is to a large extent a new book. Since the late author's death in 1881 (a), three editions of the book have been prepared by the present editor; and in these the original text was, as far as possible, retained. It was felt, however, that the symmetry of the original work was impaired by the additions and alterations rendered necessary not only by the great changes in law and practice worked by the Conveyancing and Settled Land Acts, but also by the progress of historical learning. In preparing the edition now submitted to the profession the editor has ventured to work with a free hand, and to remodel the book after a design of his own. The subject is therefore presented under an arrangement different from that previously employed, and a very considerable proportion of the text is new. At the same time the scheme now adopted is no more than a development of the late

(a) The first edition of "Williams on Real Property" was published in 1845, and the thirteenth, the last

edition prepared by the late author himself, in 1880.

author's plan, and much of what he wrote has been preserved (b) And throughout the present edition the editor has endeavoured to harmonise the old matter and the new, so as to carry out, as far as possible, the late author's idea in projecting the original work, viz., to write a readable book, and one intelligible to a student without previous knowledge of the law.

The editor must gratefully acknowledge the benefit his work has derived from the criticism of his friend Mr. F. W. MAITLAND, Downing Professor of the Laws of England at Cambridge, who was kind enough to read some portions of the book in manuscript.

An entirely new index to the book, and to the cases, year-books and statutes cited, has been prepared by Mr. KENNETH F. WOOD, of Lincoln's Inn, to whom the editor is also indebted for much efficient help in passing the work through the press.

A few cases, decided since the text was in print, are referred to in the *Addenda*, by the aid of which the work is brought down to the date given below.

7, STONE BUILDINGS, LINCOLN'S INN,
25th June, 1892.

(b) The late author's Appendices are untouched.

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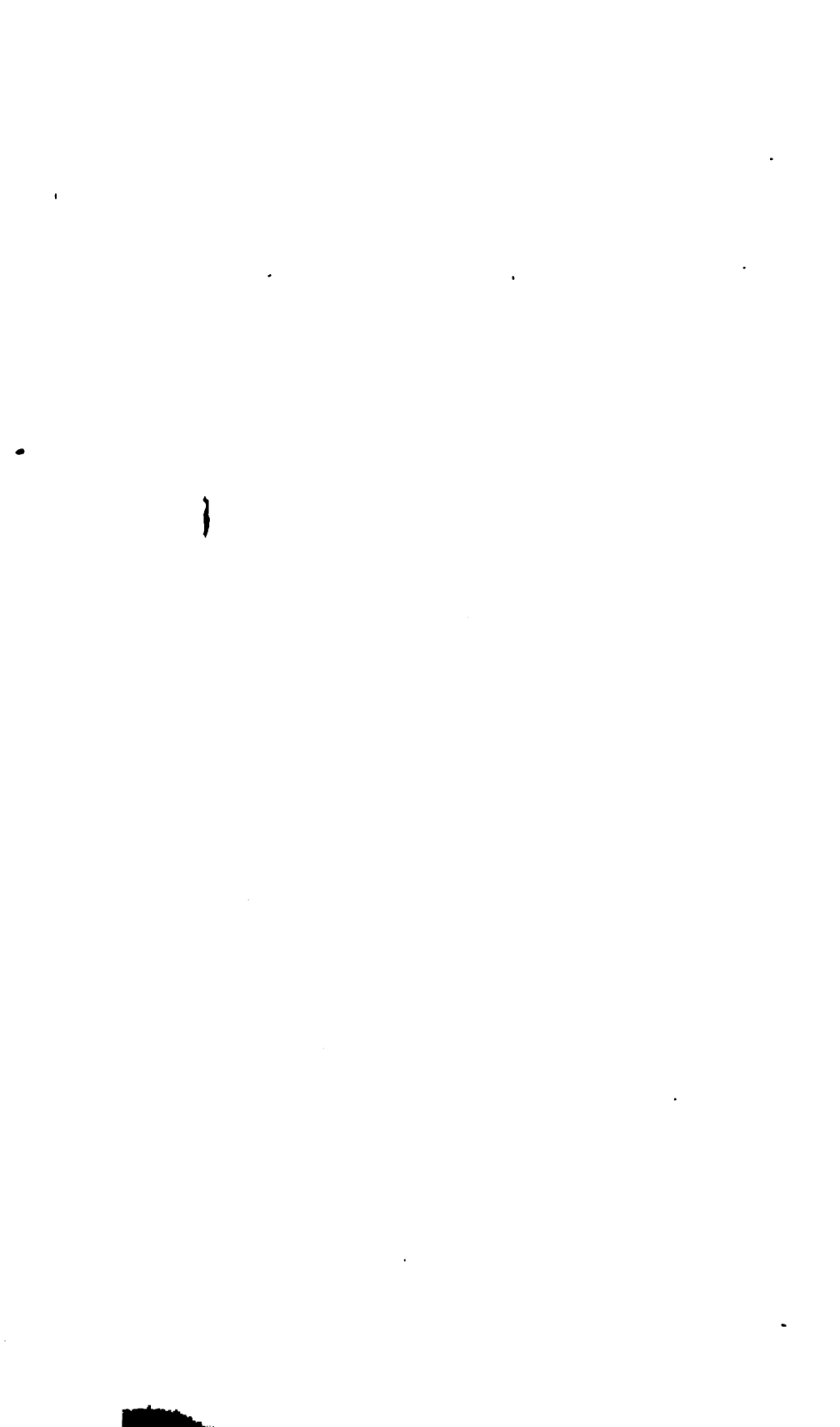
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A. C. Appeal Cases after 1890. See under L. R.
A. & E. Adolphus and Ellis's Queen's Bench Reports.
A.-G.	. . . .	. Attorney-Geueal.
Amb.	. . . .	. Ambler's Reports in Chancery from 1787 to 1788.
Anst.	. . . .	. Anstruther's Reports in the Court of Exchequer, from 1792 to 1797.
App. Cas.	. . . .	. Appeal Cases from 1875 to 1890. See under L. R.
Ass.	. . . .	. Liber Assisarum.
Atk.	. . . .	. Atkyn's Reports in Chancery from 1786 to 1784.
B. & A.	. . . .	. Barnewall & Alderson's Reports in the King's Bench from 1817 to 1822.
B. & Ad.	. . . .	. Barnewall & Adolphus's Reports in the King's Bench.
B. & C. or Barn. & Cress.	. . . .	. Barnewall & Cresswell's Reports in the King's Bench.
B. & P., or Bos. & Pul.	. . . .	. Bosanquet & Fuller's Reports in the Common Pleas from 1797 to 1804.
B. R.	. . . .	. Bancum Regis, the King's Bench.
B. & S.	. . . .	. Best & Smith's Reports in the Queen's Bench.
Bac. Abr.	. . . .	. New Abridgment of the Law by Matthew Bacon, Gwillim & Dodd's Edition in 8 vols.
Bac. Tr.	. . . .	. The Law Tracts of Lord Bacon.
Beav.	. . . .	. Beavan's Reports in the Rolls Court.
Bing.	. . . .	. Bingham's Reports in the Common Pleas.
Bing. N. C.	. . . .	. Bingham's New Cases in the Common Pleas.
Black. Comm.	. . . .	. Blackstone's Commentaries.
Bligh N. S.	. . . .	. Bligh's New Reports of Cases in the House of Lords from 1827 to 1837.
Bract.	. . . .	. Bracton de Legibus.
Britt.	. . . .	. Britton's Treatise.
Bro. Abr.	. . . .	. Brooke's Abridgment.
W. R. P.		

TABLE OF ABBREVIATIONS.

Bro. C. C.	. . .	. Brown's Cases in Chancery from 1778 to 1794.
Brod. & Bing.	. . .	. Broderip & Bingham's Reports in the Common Pleas from 1819 to 1822.
Bulst.	. . .	. Bulstrode's Reports in the King's Bench in the time of James I. & Charles I.
Burr.	. . .	. Burrow's Reports in the King's Bench from 1756 to 1772.
C.	. . .	. Chancellor.
Ch.	. . .	. Chancery. See under L. R.
C. B.	. . .	. The Common Bench or Court of Common Pleas, also the Common Bench Reports.
C. B. N. S.	. . .	. Common Bench Reports, New Series.
C. J.	. . .	. Chief Justice.
C. P.	. . .	. Common Pleas. See under L. R.
C. P. Coop.	. . .	. Charles Purton Cooper's Reports in Chancery.
C. P. D.	. . .	. Common Pleas Division.
C. & P.	. . .	. Carrington & Payne's Reports of Cases at Nisi Prius from 1828 to 1841.
Ca. t. Talb.	. . .	. Cases in Chancery in time of Lord Talbot.
Cal.	. . .	. Calendar of Proceedings in Chancery published by the Record Commission.
Cary	. . .	. Cary's Reports in Chancery, chiefly in the reign of Elizabeth.
Ch. D.	. . .	. Chancery Division. See under L. R.
Cha. Ca.	. . .	. Cases in Chancery, folio.
Cha. Rep.	. . .	. Reports in Chancery, folio.
Cl. & Fin.	. . .	. Clark & Finnelly's Reports in the House of Lords.
Co.	. . .	. Coke's Reports generally cited as Rep.—the Reports par excellence.
Co. Cop.	. . .	. Coke's Complete Copyholder.
Co. Litt.	. . .	. Coke upon Littleton.
Co. Tr.	. . .	. Coke's Law Tracts.
Coll.	. . .	. Collyer's Reports in Chancery.
Com.	. . .	. Comyns's Reports.
Com. Dig.	. . .	. Chief Baron Comyns's Digest of the Law.
Conn. & Laws.	. . .	. Connor & Lawson's Reports in the Irish Court of Chancery.
Coop.	. . .	. G. Cooper's Reports in Chancery.
Cowp. Cowper's Reports in the King's Bench from 1774 to 1778.
Cox. Cox's Reports of Equity Cases from 1783 to 1798.

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Cro. El.	}	Croke's Reports in time of Elizabeth, James I. and Charles I.
Cro. Jac.		
Cro. Car.		
Cro. & Jer.		Crompton & Jervis's Reports in the Court of Exchequer.
Cro. & M.		Crompton & Meeson's Reports in the Court of Exchequer.
Cro. M. & R.		Crompton, Meeson & Roscoe's Reports in the Court of Exchequer.
Cru. Fi.	}	Cruise on Fines and Recoveries.
Cru. Rec.		
Dart, V. & P.		Dart on Vendors and Purchasers.
De G. & J.		De Gex & Jones's Reports in Chancery.
De G., F. & J.		De Gex, Fisher & Jones's Reports in Chancery.
De G., M. & G.		De Gex, Macnaghten & Gordon's Reports in Chancery.
De G. & S.		De Gex & Smale's Reports in Chancery.
Dig.		The Digest of Justinian.
Dom. Proc.		Domus Procerum, the House of Lords.
Dougl.		Douglas's Reports.
Dow. & Ryl.		Dowling & Ryland's Reports in the King's Bench.
Drew.		Drewry's Reports in the Court of Vice-Chancellor Kindersley.
Drew. & Sma.		Drewry & Smale's Reports in the same Court.
Dru. & War.		Drury & Warren's Reports in the Irish Court of Chancery.
Drury		Drury's Reports in the Irish Court of Chancery.
Dyer		Dyer's Reports in the time of Henry VIII., Edward VI., Mary and Elizabeth.
E. & B.		Ellis & Blackburn's Queen's Bench Reports.
E. B. & E.		Ellis, Blackburn & Ellis's Queen's Bench Reports.
East		East's Reports in the King's Bench.
Eden		Eden's Reports in Chancery from 1757 to 1766.
Eq. Ca. Ab.		Abridgment of Cases in Equity, folio.
Esp.		Espinasse's Nisi Prius Reports.
Ex.		Exchequer Reports from 1847 to 1856. See under L. R.
Ex. D.		Exchequer Division. See under L. R.
F. N. B.		Fitzherbert's Natura Brevium.
Fearne, C. R.		Fearne on Contingent Remainders and Executory Devises. Butler's Edition.
Fitz. Abr.		Fitzherbert's Abridgment.

Fleta	The anonymous treatise on English Law, so called, of the time of Edw. I.
Fonbl. Eq.	Fonblanque's Edition of the Anonymous Treatise on Equity.
Freem.	Freeman's Chancery Reports from 1660 to 1706.
Gai.	The Commentaries of Gaius.
Giff.	Giffard's Reports in the Court of Vice-Chancellor Stuart.
Gilb. Ten.	Chief Baron Gilbert's Treatise on Tenures.
Gilb. Uses	Chief Baron Gilbert's Treatise on Uses.
Glanv.	The treatise on English Law at the time of Henry II., attributed to Glanville.
H. Bl.	Henry Blackstone's Reports from 1788 to 1796.
H. & C.	Hurlstone & Coltman's Exchequer Reports.
H. L.	The House of Lords. See under L. R.
H. L. C.	House of Lords Cases from 1847 to 1866.
H. & N.	Hurlstone & Norman's Exchequer Reports.
Hale, P. C.	Sir Matthew Hale's Treatise on Pleas of the Crown.
Hard.	Hardres's Reports in the Court of Exchequer, folio, from 1655 to 1669.
Hare	Hare's Reports in Chancery.
Hil.	Hilary Term.
Hob.	Hobart's Reports in the time of James I.
Inst.	Coke's Institutes; also used for Justinian's Institutes.
J.	Justice.
J. B. Moore	J. B. Moore's Reports in the Court of Common Pleas.
J. & W.	Jacob & Walker's Reports in Chancery.
Jac.	Jacob's ditto.
Jarm. Wills	Jarman on Wills.
Joh.	Johnson's Reports, Vice-Chancellor Wood.
J. & H.	Johnson & Hemming's Reports, Vice-Chancellor Wood.
Jones & Lat.	Jones & Latouche's Reports in the Irish Court of Chancery.
Jur.	Jurist Reports.
Jur., N. S.	Jurist Reports, New Series.
Kay	Kay's Reports in the Court of Vice-Chancellor Wood.
K. & J.	Kay & Johnson's Reports in the Court of Vice-Chancellor Wood.
Keb.	Keble's Reports, folio.

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Keen Keen's Reports in the Rolls Court, from 1886 to 1887.
Keil Keilway's Reports.
L. J.	. . . .	. Law Journal Reports.
L.-J.	. . . .	. Lord Justice.
L. R.	. . . .	. The Law Reports of the Incorporated Council of Law Reporting, which are usually cited as follows:—

From 1865 to 1875—

L. R., A. & E.	. . . .	. Admiralty and Ecclesiastical Cases.
L. R., Ch.	. . . .	. Cases in the Court of Appeal in Chancery.
L. R., C. P.	. . . .	. Common Pleas Cases.
L. R., C. C. R.	. . . .	. Crown Cases Reserved.
L. R., Eq.	. . . .	. Equity Cases.
L. R., Ex.	. . . .	. Exchequer Cases.
L. R., H. L., or E. & I.	. . . .	. English and Irish Appeals to the House of Lords.
L. R. P. C.	. . . .	. Privy Council Cases.
L. R., P. & D., or P. & M.	. . . .	. Probate and Divorce Cases.
L. R., Q. B.	. . . .	. Queen's Bench Cases.
L. R., Sc. App.	. . . .	. Scotch Appeals to the House of Lords.

From 1875 to 1890—

(Usually without prefixing L. R.)

App. Cas.	. . . .	. Appeal Cases (House of Lords and Privy Council).
Ch. D.	. . . .	. Chancery Division Cases.
C. P. D.	. . . .	. Common Pleas Division Cases.
Ex. D.	. . . .	. Exchequer Division Cases.
P. D.	. . . .	. Probate Division Cases, including Admiralty and Ecclesiastical Cases.
Q. B. D.	. . . .	. Queen's Bench Division Cases, including Crown Cases Reserved.

After 1890—

(Prefixing the date of the year only, as)

1891, A. C.	. . . .	. Appeal Cases.
1891, Ch.	. . . .	. Chancery Division Cases.
1891, Q. B.	. . . .	. Queen's Bench Division Cases.
1891, P.	. . . .	. Probate Division Cases.

L. T.	. . . .	. Law Times Reports.
Lane	. . . .	. Lane's Reports, Exch., 8-9 James I.
Leon.	. . . .	. Leonard's Reports, folio, in time of Elizabeth and James.
Lev.	. . . .	. Levinz's Reports from 1660 to 1695.
Litt.	. . . .	. Littleton's Tenures.
Lord Raym.	. . . .	. Lord Raymond's Reports.
M. or Mich.	. . . .	. Michaelmas Term.
M. & Cr.	. . . .	. Mylne & Craig's Reports in Chancery.
M. R.	. . . .	. Master of the Rolls.

M. & S.	Maule & Selwyn's Reports in the King's Bench.
M. & W.	Meeson & Welsby's Reports in the Exchequer.
Mac. & G.	Macnaghten & Gordon's Reports in Chancery.
McClelland	McClelland's Exchequer Reports in 1824.
Mad. Form. Ang.	Madox's Formulæ Anglicanum.
Madd.	Maddock's Reports in the Vice-Chancellor's Court.
Man. & Gr.	Manning & Granger's Reports in the Court of Common Pleas.
Mer.	Merivale's Reports in Chancery from 1815 to 1817.
Mod.	Modern Reports in time of Charles II.
Moo.	Sir Fr. Moore's Reports, folio, in time of Elizabeth and James.
Moo. & Malk.	Moody & Malkin's Reports at Nisi Prius from 1826 to 1830.
Moo. & Scott	Moore & Scott's Reports in the Common Pleas.
My. & K.	Mylne & Keen's Reports in Chancery.
Nev. & Man.	Neville & Manning's Reports in the Queen's Bench.
New Cas.	Bingham's New Cases in the Common Pleas.
New Rep.	Bosanquet & Fuller's New Reports in the Common Pleas.
O. Bridg.	Sir Orlando Bridgman's Judgments, edited by Bannister.
Owen	Owen's Reports in the reign of Elizabeth.
P.	Probate. See under L. R.
P. C.	Privy Council. See under L. R.
P. D.	Probate Division. See under L. R.
P. Wms. or	} Peere Williams' Reports in Chancery from 1695 to 1735.
P. W.	
Parker	Parker's Revenue Cases from 1748 to 1767.
Pasch.	Easter Term.
Per. & Dav.	Perry & Davison's Reports in the Queen's Bench.
Perk.	Perkins's Profitable Book.
Ph.	Phillips' Reports in Chancery.
Plowd.	Plowden's Commentaries or Reports, folio.
Pollexf.	Pollexfen's Reports, folio, from 1670 to 1684.
Popham	Popham's Reports, folio.
Pre. Cha.	Precedents in Chancery from 1687 to 1722.
Prec. Conv.	Precedents in Conveyancing.

TABLE OF ABBREVIATIONS.

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Prest. Abstr. Preston on Abstracts of Title.
Prest. Conv. Preston on Conveyancing.
Price	. . .	. Price's Reports in the Court of Exchequer.
Q. B.	. . .	. Queen's Bench; also the Queen's Bench Reports from 1841 to 1852. See under L. R.
Q. B. D.	. . .	. Queen's Bench Division. See under L. R.
R.	. . .	. Rex or Regina.
Rep.	. . .	. The Reports of Lord Coke.
Ro. Ab.	. . .	. Rolle's Abridgment.
Rob. Gav.	. . .	. Robinson on Gavelkind.
Rob. Husb. & Wife	. . .	. Roper's Treatise on the Law of Husband and Wife. Edited by Jacob.
Rot. Hund.	. . .	. Rotuli Hundredorum, the Hundred Rolls (Record Commission).
Rot. Parl.	. . .	. Rotuli Parliamentorum, the Rolls of Parliament.
Russ.	. . .	. Russell's Reports in Chancery.
R. & M. or Russ. & My.	. . .	. Russell and Mylne's Reports in Chancery.
S. C.	. . .	. Same case.
S. & S. or Sim. & Stu.	. . .	. Simons and Stuart's Reports in the Vice-Chancellor's Court.
Salk.	. . .	. Salkeld's Reports, folio, from 1 W. & M. to 10 Anne.
Sand. Uses	. . .	. Sanders on Uses and Trusts.
Sax. Chro.	. . .	. The Saxon Chronicle.
Sch. & Lefr.	. . .	. Schoales and Lefroy's Reports in Chancery in Ireland in time of Lord Redesdale.
Scriv. Cop.	. . .	. Scriven on Copyholds, 3rd Ed.
Shep. Touch.	. . .	. Sheppard's Touchstone of Common Assurances.
Sim.	. . .	. Simons' Reports in the Vice-Chancellor's Court.
Sir T. Raym.	. . .	. Sir Thomas Raymond's Reports.
Sm. & Giff.	. . .	. Smale & Giffard's Reports in the Court of Vice-Chancellor Stuart.
Spence, Eq. Jur.	. . .	. Spence's Equitable Jurisdiction.
Stark.	. . .	. Starkie's Nisi Prius Reports.
Stat.	. . .	. Statute.
Str.	. . .	. Strange's Reports from 1716 to 1747.
Style	. . .	. Style's Reports from 1646 to 1655.
Sugd. Pow.	. . .	. Sugden (afterwards Lord St. Leonards) on Powers.
Sugd. V. & P.	. . .	. Sugden (afterwards Lord St. Leonards) on Vendors and Purchasers.
Swanst.	. . .	. Swanston's Reports in Chancery in 1818 and 1819.

T. R.	Term Reports in the King's Bench by Durnford and East, from 1785 to 1800.
Tan. or Taunt.	Taunton's Reports in the Common Pleas from 1807 to 1819.
Times L. R.	Times Law Reports.
Toth.	Tothill's Transactions of the Court of Chancery.
Trin.	Trinity Term.
Turn.	Turner's Reports in Chancery in 1823 and 1823.
T. & R.	Turner and Russell's Reports in Chancery.
Tyr.	Tyrwhitt's Reports in the Court of Exchequer.
Ulp. Frag.	Ulpiani Fragmenta.
V. & B.	Vesey & Beames's Reports in Chancery in 1818 and 1814.
V.-C.	Vice-Chancellor.
Vaughan	Vaughan's Reports in the time of Charles II.
Ventr.	Ventris's Reports in the time of Charles II.
Vern.	Vernon's Reports in Chancery from 1680 to 1716.
Ves. or Ves. Sen.	Vesey's Reports in Chancery from 1747 to 1755.
Ves. Jun.	Vesey Junior's Reports in Chancery from 1759 to 1816.
Vin. Abr.	Viner's Abridgment.
W. Black.	Sir William Blackstone's Reports from 1746 to 1780.
W. N.	The Weekly Notes of the Council of Law Reporting.
W. R.	The Weekly Reporter.
Watk. Cop.	Watkins on Copyholds.
Watk. Des.	Watkins on Descent.
Wightw.	Wightwick's Reports in the Court of Exchequer.
Willes	Willes's Reports.
Wils.	Wilson's Reports in King's Bench and Common Pleas from 1742 to 1769.
Wms. Saund.	Saunders's Reports in time of Charles II. Edited by Serjeant Williams and Sir E. V. Williams.
Y. B.	Year Book.
Y. & C. or Y. & C. Ex.	Younge & Collyer's Reports in the Equity Exchequer.
Y. & C. C. C.	Younge & Collyer's Reports in Chancery.
Y. & J.	Younge & Jervis's Exchequer Reports.

ERRATA.

- Page 28, note (s) . . . For "Year Book 4 Edw. IV. 83," read
"Year Book 21 Edw. IV. 88."
- „ 73, note (e) . . . For "12 Sin. 84," read "12 Sim. 84."
- „ 120, note (g) . . . For "stat. 50 & 51 Vict. c. 50," read "stat.
50 & 51 Vict. c. 30."
- „ 123, note (s) . . . For "stat. 52 & 53 Vict. c. 50," read "stat.
50 & 51 Vict. c. 30."
- „ 137, note (e) . . . For "stat. 37 & 38 Vict. c. 83, s. 5," read
"stat. 31 & 32 Vict. c. 40, s. 5."
- „ 521, note (a) . . . For "*Winter v. Lord Hanson*," read
"*Winter v. Lord Anson*."

ADDENDA.

- Page 52, note (p) . . . Add "The extinguishment of any quit-rent
or other manorial incident may now be
compelled by lord or tenant under stat.
50 & 51 Vict. c. 73, s. 6."
- „ 74, note (i) . . . Add "It appears that voluntary conveyances
to a charity cannot be avoided under this
Act. *Ramsay v. Gilchrist*, 8 Times L. R.
594."
- „ 102, line 15 . . . Add a reference to *Re Duke of Marlborough's
Blenheim Estates*, 8 Times L. R. 582.
- „ 115, note (g), and page 120, line 10 & note (g). Add a reference to
stat. 52 & 53 Vict. c. 86.
- „ 116, note (o) . . . *Re Marquis of Ailesbury's Settled Estates* is
now reported in L. R. 1892, 1 Ch. 505.
- „ 197, line 24 . . . After the word *registration* add a note:—
"By stat. 48 & 49 Vict. c. 26, s. 3, a
caveat in favour of any person may be
registered with respect to any lands in
Yorkshire by any person claiming to be
entitled to any interest therein; and if,
while the *caveat* remains in force, an
assurance of the lands from the giver of
the *caveat* to the other, his representatives
or assigns, be duly registered, such assur-
ance shall have priority as though it had
been registered on the date of registration
of the *caveat*."

- Page 208, notes (g), (h) . Add a reference to *Re Twigg's Estate*, 1892, 1 Ch. 579.
- „ 249, note (g) . . } Add a reference to *Re Anthony*, 1892, 1 Ch.
 „ 253, note (g) . . } 450.
- „ 272, note (x) . . . Add a reference to *Re G— (an infant)*, 1892, 1 Ch. 292.
- „ 273, note (e) . . . Add a reference to *Imperial Loan Co., Ltd. v. Stone*, 1892, 1 Q. B. 599.
- „ 292 Since the text of this page was in print, it has been decided that a husband shall have curtesy of land, which is his wife's separate property under the Married Women's Property Act, 1882; *Hops v. Hops*, Stirling, J., 8 Times L. R. 504.
- „ 474, lines 4 to 8 . . Amend the sentence as follows:—“And where the lessor is proceeding to enforce such a right of re-entry, the Court is authorized, on the application of the lessee, to grant relief against the forfeiture incurred, if, &c.” And after the word *re-entry*, add a note:—“But not after the lessor has actually recovered possession in execution of a judgment in his favour obtained in an action brought to enforce such a right; *Rogers v. Rice*, C. A., 8 Times L. R. 511. See *Lock v. Pearce*, W. N. 1892, p. 82.”
- „ 491, note (L) . . . Add a reference to *Snow v. Boycott*, W. N. 1892, p. 89.
- „ 508, note (s) . . . Add a reference to *Re Anthony*, 1891, 1 Ch. 450.
- „ 526, note (e) . . . Add a reference to the note above directed to be added to page 197, line 24.
- „ 533, note (f) . . . Add a reference to *Pedder v. Hunt*, 18 Q. B. D. 565.

PRINCIPLES

OF THE

LAW OF REAL PROPERTY.

INTRODUCTORY CHAPTER.

OF THE NATURE OF REAL PROPERTY OR ESTATE AND CHATTELS REAL.

SECTION I.

Of the nature of Property and Ownership.

It is probable that many of those, who open this book, have heard of a distinction made in law between real and personal property. They are perhaps aware that the law of real property has to do with the ownership of land; and it is very unlikely that they have formed no opinions on the subject of the laws of property. Popular notions of law often contain an element of truth: but they are rarely exact. The student of real property law will, therefore, do well to begin by considering the exact meaning of one or two terms, with the common use of which he is doubtless familiar.

In the first place, what is meant by the word *property*? The common conception of property may perhaps be said to be this; that a man's property is what is his own to do what he likes with. It is

Ownership.

Incidents of absolute ownership.

generally understood that those things are a man's property, which are the object of *ownership* on his part. What then is ownership? Without pretending to formulate a definition, we may venture to assert that ownership chiefly imports the right of exclusive enjoyment of some thing (*a*). The owner in possession of a thing has the right to exclude all others from the possession or enjoyment of it; and if he be wrongfully deprived of what he owns, he has the right to recover possession of it from any person. This right to maintain or recover possession of a thing as against all others may, I think, be said to be the essential part of ownership. As regards its other incidents, ownership may be absolute or else limited or restricted. Thus absolute ownership would seem to include the right of *free*, as well as exclusive, enjoyment; by which I mean the right of using, altering or destroying the thing owned at the owner's pleasure, so only that he do not violate any other person's right to security of person and property. But those, who have rights of exclusive, though restricted, enjoyment, are nevertheless commonly termed owners (*b*). Another incident of absolute ownership is free power of disposition, that is, the right of the owner to transfer as he will the whole or any part of his rights over the thing owned. And in modern times free power of disposition is generally incident to and indeed inseparable from any ownership (*c*). But the student will find that in earlier times those were regarded as owners, whose right to maintain or recover possession was secured by law, though their power of disposition was limited (*d*). Again, it is essential to absolute owner-

(a) See 2 Austin's Jurisprudence, 817, 4th ed.

(b) English landlords, who are tenants for life, are commonly called landowners, notwithstanding that they may be restrained from laying their land waste, or

pulling down their houses.

(c) Litt. s. 260; Co. Litt. 228 a; *Bradley v. Poicote*, 3 Ves. jun. 324; *Ross v. Ross*, 1 J. & W. 154; *Ware v. Cann*, 10 B. & C. 433.

(d) Glanville, lib. 1, c. 5, 7; lib. vii. c. 1, 5; lib. xii., xiii;

ship that it should be of indeterminate duration; no limit of time must be set beyond which the enjoyment of the thing owned shall not endure. So that any right of user or enjoyment limited to endure for any period of life or years cannot amount to absolute ownership, which is interminable. And any right of exclusive enjoyment of a thing, for whatever period, which is derived out of the ownership of another (*e*), seems to fall short of absolute ownership. But the term owners is commonly used to include those, who have right of exclusive enjoyment of anything for a limited time, as well as absolute owners (*f*). Thus the word *ownership* is used by lawyers sometimes in the strict sense of absolute ownership, sometimes in a looser sense to express a right of exclusive enjoyment, which, though possibly lacking some of the incidents of absolute ownership, includes at least the right to maintain or recover possession of some thing as against all others.

Having gained some notion of the legal sense of *ownership*, let us see what meaning is attached in law to the term *property*. This word is mainly used by *Property*. lawyers in three different senses: — (1) As denoting the right of ownership. For instance, if a man lend his goods to a friend, it is said that the *property* in the goods remains in the lender. We also speak of *property* in land. (2) As denoting the object of a right of ownership. Thus, it may be said that certain goods are

Bract. fo. 3 a, 8 b, 10 b, 81, 102, 112 b, 113 a, 180 a, 195 b, 206, 263, 268, 434 b, 435 a; Britton, liv. 2, ch. 16, s. 2; Mirror, ch. 2, s. 25; Litt. ss. 9, 10; Co. Litt. 17 a, 286 a.

(*e*) As where one holds land on lease from another for a term, say, of a thousand years, on the expiration of which the lessor's successors in title will have the right to resume possession of the land; or where one man and his heirs

hold land of another and his heirs, so that, on failure of the heirs of the former, the latter or his successors in title will have the right to resume possession of the land.

(*f*) English landlords, who are mostly tenants for life only, are commonly called landowners: see stats. 6 & 7 Will. IV. c. 71, s. 12; 8 & 9 Vict. c. 18, ss. 3, 79, 84, 127; 27 & 28 Vict. c. 114, s. 8; 33 & 34 Vict. c. 56; 34 & 35 Vict. c. 84; 40 & 41 Vict. c. 81.

the *property* of a certain man; or, speaking of land, that the *property* of one man adjoins the *property* of another; or that *property* may consist either of immoveable things, as land, or of moveable things, as coined money. (3) As denoting valuable things — things, which can be turned into money or assessed at a money value; in other words, rights which may be exchanged for the ownership of money (*g*). It is in this last sense that the word *property* seems to be used when a man speaks of all his property, or of his real as opposed to his personal property (*h*). Property then may mean either (1) ownership, or (2) the objects or an object of ownership, or (3) valuable things, according to the context. Now things, according to a classification imported from Roman into English law, are either corporeal or incorporeal. Corporeal things are tangible objects, as land or gold: incorporeal things are those which are intangible, such as legal relations and rights, including legal obligations and rights of action (*i*). And property, as meaning valuable things, includes incorporeal as well as corporeal things. That is to say, property consists of two kinds of things: — (1) tangible things in their owner's possession; (2) valuable rights of various kinds unaccompanied with the possession of anything corporeal. Or, if it be preferred to treat property as an aggregate of rights, the same classification may be propounded in this way: — Property consists (1) of rights

Things
corporeal or
incorporeal.

(*g*) See Lord Mansfield, *Hogan v. Jackson*, Cowp. 299, 307; Savigny, *System des heutigen römischen Rechts*, vol. i., s. 58, pp. 338—340.

(*h*) See *Doe d. Wall v. Langlands*, 14 East, 370; *Doe d. Morgan v. Morgan*, 6 B. & C. 512.

(*i*) Bract. fo. 10 b. In modern times this classification of things, as corporeal or incorporeal, has been subjected to adverse criticism, on the ground that it opposes things, considered as the

object of rights, to the rights themselves; see Austin's *Jurisprudence*, 371, 804, 4th ed. The student of any legal system, however, must take it as he finds it. It is idle for him to find fault with ideas, which have obtained actual currency therein, and which he is therefore bound to accept as "legal tender." If any such ideas conflict with his sense of what ought to be, he should look for explanation to the history of law.

of ownership in tangible things clothed with possession; (2) of bare rights or mere rights; rights unaccompanied with possession, which are nevertheless valuable. But it is more in accordance with the treatment of the subject which has obtained in our law (*k*), as well as with common usage, to classify property as consisting of corporeal things, as land or moveable goods, or of incorporeal things, mere rights regarded objectively as a source of profit. Everyone understands that the land and moveable goods, which a man possesses as owner, are part of his property: but he may have other valuable things besides the land and goods in his possession. It is probably within the reader's knowledge that a man may have land let to yearly tenants, or may be entitled to land on the death of some tenant for life. In either case he has a mere right (*l*), without the possession of anything corporeal; for the land is in the possession of the yearly tenants or life tenant. But his right to the land, subject to the yearly or life tenancy, is a valuable thing, and is for that reason part of his property. Again, one need be no lawyer to know that a man's property may also include rights of way, of pasture for cattle, or of fishing or shooting over other's land. Everyone reckons debts due to himself as part of his property; and at the present day stocks and shares are forms of property which are familiar to many. All these things, however, are mere rights, unaccompanied with the possession of anything corporeal. Some, as we have seen, are rights over land, of which others are in possession as owners. A debt is nothing more than the right to sue another for money due (*m*). What is generally spoken of as a sum of Government stock is properly the right to receive from Government perpetual annuities redeemable on payment of a certain sum, for

(*k*) See Co. Litt. 121 b, 374 b.

(*l*) See Bracton, fo. 8 a, 7 b, 31, 39 a, 160 a, 206 b, 264 a, 434 b;

Co. Litt. 369 a.

(*m*) Principles of the Law of Personal Property, 11, 13th ed.

example, £100 for every £2 15s. of annuity (*n*). A share in a joint-stock company, regarded as a source of emolument, is a right to receive a certain share of the profits of the company (*o*). All these different rights are however valuable; they may be turned into money and their worth can be assessed in money. Being valuable things, they are reckoned as property. But in including such incorporeal things in property, no heed is paid to the nature of the rights of which they consist; they are simply regarded objectively as sources of profit.

SECTION II.

Of Property in Land and Goods in English Law.

Distinction in English law between property in lands and property in goods.

No absolute ownership of land.

Estate in fee simple.

Having thus examined the meaning of *ownership* and *property*, our next step towards apprehending the nature of real property will be to advert to the distinction drawn in English law between property in land and property in moveable goods. It is this:—An English subject may enjoy the absolute ownership of goods, but not of land (*p*). The law does not recognize *absolute* ownership of land, unless in the hands of the Crown; and the greatest interest in land, which a subject can have, is an estate in fee simple (*q*), that is to say, an estate inheritable by his blood-relations, collateral as well as lineal, according to the legal order of succession, and held feudally of some lord by some kind of service.

(*n*) *Ib.* 254; *Wildman v. Wildman*, 9 Ves. 174, 177.

(*o*) *Ib.* 265 *et seq.*; *Colonial Bank v. Whimney*, 80 Ch. D. 261, 286; 11 App. Cas. 426, 438.

(*p*) This distinction is not essential. In Roman law land

and moveable goods might be the object of the same *dominium ex jure Quiritium*; Gai II. §§ 15—25, 40—42; Ulp. Frag. xix.

(*q*) Litt. s. 11; Co. Litt. 4 a; *Countess of Bridgewater v. Duke of Bolton*, 6 Mod. 106, 109.

For by English law, the king is the supreme owner, or lord paramount, of every parcel of land in the realm (*r*); and all land is holden of some lord or other and either immediately or mediately (*s*) of the king (*t*). But it must not be supposed because an English subject can have no absolute, interminable and undervived (*u*) ownership of land, that proprietary rights in land are unknown to the law. On the contrary, the law secures to every one, who holds an estate in land, the exclusive enjoyment of his holding, and gives him the right to maintain or recover possession thereof against all others (*x*). To an estate in fee simple there are moreover now incident the rights of free enjoyment and free disposition; so that such an estate is well-nigh equivalent to absolute property (*y*). It is common to speak of land-owners and the ownership of land; and such expressions are found even in Acts of Parliament (*yy*). English law then recognizes property in but not absolute ownership of land; the most absolute property in land that a subject can have is but an estate (*z*). Here may be explained what is meant by this word *estate*, which will be constantly encountered by the student of real property law. Everyone knows that a man's lands are often referred to as his estate or his estates; but the popular sense of the word is a modification of its legal meaning. Estate is the Latin word *status* (*a*), which originally denoted a man's personal condition in law (*b*), but was used to

(*r*) Co. Litt. 65 a.

(*s*) That is, either directly of the king, or directly of some intermediate, or *means* lord, between the tenant and the king.

(*t*) Co. Litt. 93 a.

(*u*) See *ante*, p. 8.

(*x*) 3 Black. Comm. 187 *et seq.*, 209.

(*y*) See *ante*, p. 2.

(*yy*) See Co. Litt. 17, 266 a, 269 a; *Overseers of West Ham v.*

Ilce, 8 App. Cas. 386; *stats.*

38 Geo. III. c. 5, s. 48; 58

Geo. III. c. 45, ss. 39, 60; 5 & 6

Vict. c. 35, ss. 1, 60 (No. iv., 2, 10, 12); and the *stats.* cited in

note (*f*) to p. 3, *ante*.

(*z*) Holt, C. J., 6 Mod. 109.

(*a*) Co. Litt. 9 a, 345 a.

(*b*) Glanv. lib. 5, c. 1; Bract. fo. 26 a, 199 b; Fleta, lib. iv., c. 11.

Meane lord.

describe, first, the nature of his interest in land and then the extent of such interest (*c*). In law, a landholder's estate is his interest in the land, of which he is tenant; and the word is especially used to denote the extent of his interest. Thus a man is said to have an estate for life in land, or an estate of inheritance, as an estate in fee simple; and all his estate in his land is equivalent to all his right therein (*d*). The word *estate* also has a third meaning. It is used to denote the whole of any person's valuable interest in land or goods. A man's whole "estate" is equivalent to all his "property;" it includes all his valuable rights (*e*).

The student, being informed of the distinction drawn in English law between property in land and property in goods, and knowing that real property has to do with the ownership of land, may perhaps be inclined to conclude that real property must be property in land, while property in goods is personal property. Unfortunately the matter is not so simple. Real property certainly is for the most part property in land: but all property in land is not real property. The explanation of this is to be found in the circumstances of our legal history. We must look for the answer to the days of our early common law. This will lead us back to the times immediately following the Norman Conquest, when the doctrine of the feudal tenure of land was established as part of our law; to the reign of Henry II., when judges of the King's Court were first appointed to sit

(*c*) Bract. fo. 40 b, 42, 50 b, 262 a, 428 b, 424 a; *Thomas of Weyland's case*, Rot. Parl. i. 66; stat. 27 Edw. III., st. 2, c. 9; Madox, Form. Angl. Nos. 170, 172, 192; *Rothensale v. Wyckingham*, 2 Calendar of Proceedings in Chancery, iii.
(*d*) Litt. ss. 1, 57, 465—469, 472, 650; Co. Litt. 345 a, b;

Holt, C. J., 6 Mod. 109, 110.

(*e*) *Kirwan v. Johnson* (1651), Style, 293, 294; *Countess of Bridgewater v. Duke of Bolton* (Hil. 2 Anne), 6 Mod. 106; *Scott v. Alberry* (Pasch. 6 Geo. I.), Comyns, 387, 340; *Patterson v. Huddart*, 17 Beav. 210; *Moods v. Wood*, 19 Beav. 215, 225.

permanently on the Bench (*f*), and our oldest legal text-book, that attributed to Glanville (*g*), appeared; and Glanville. to the days of Bracton, who was an English judge Bracton. under King Henry III., and wrote a treatise of high merit and authority on the laws of England (*h*).

During the three centuries, which followed the Norman Conquest, the public wealth was contained in forms very different from those of to-day. There was then no such thing as capital always ready to be expended in wages and materials for work, or invested in Government Stock or in shares in trading companies. Agriculture was the principal industry; and the people were collected in agricultural village communities, each of which supplied itself with all the necessaries of life.

Form of public wealth in eleventh to thirteenth century.

(*f*) The King's Court was originally the tribunal held by authority of the king, as the source of all justice within the realm, before himself or his chief justiciar. In Henry II.'s reign the ordinary legal business of the King's Court was delegated to judges sitting permanently at Westminster; and the institution of itinerant judges, visiting every county, was firmly established; so that the justice of the King's Court was brought home to the whole people. After Henry III.'s reign the original jurisdiction of the King's Court of Law was divided between its three branches, the Courts of King's Bench, Common Pleas, and Exchequer; to be again united in the year 1875 in the High Court of Justice established by the Judicature Acts. The King's Courts of Law have been the chief agents in the development of the common law, which is derived from the ancient customs of the nation recognized and enforced therein as law, and the rules and principles of which have been evolved from the decisions of those courts upon cases submitted to their judgment from the time of their establishment to the present day. The legal reforms initiated by Henry II. had the effect of increasing the importance of the jurisdiction of the King's Court at the expense of that of the local tribunals, such as the county and hundred courts; and resulted in the establishment of a uniform body of judge-made law applicable throughout the land, which gradually superseded the old local customs. The enormous influence of Henry II.'s judicial institutions may be gauged by the fact that Bracton's treatise written in Henry III.'s reign is as much founded on English case law as any modern text book. See Madox, *Hist. Exch.* ch. i.—iii., xix.; Stubbs, *Const. Hist.* ch. xi. §§ 118, 120, 125—127, ch. xiii. § 163, ch. xv. §§ 233, 235; Maitland, *Bracton's Note Book*, *Introd.* pp. 1—12, 18; Selden Society, *Select Pleas of the Crown*, *Introd.* xi. *et seq.*

The common law.

(*g*) Ranulf de Glanville, chief justiciar of England under Henry II.; see Dictionary of National Biography, art. Glanville, R. de.

(*h*) For an account of what is known of Bracton, see Maitland, *Bracton's Note Book*, vol. i., p. 18.

In the eleventh century even the dwellers in cities supported themselves by tilling their own lands. But for our present purpose, the most important distinction between those times and our own is that services, for which we are accustomed to regard payment in money as the natural remuneration, were then requited by the bestowal or occupation of a holding of land. Thus lands were given by the Conqueror to his followers to hold in return for military service. The peasantry occupied land, in return for which they were bound to labour on their lord's demesne, that portion of land which he retained in his own occupation (*z*). The village smith or carpenter often occupied a holding of land in return for his trade services; men held lands too on condition of rendering various personal services to their landlord, such as riding with him, holding his court or feeding his hounds (*k*). In fact, the whole social organisation was based on landholding in return for service (*l*). Trade was not unknown, but occupied a subordinate position; and the contracting of trade debts was a matter which concerned a limited class of persons. Property therefore was chiefly corporeal (*m*); it consisted of land on the one hand, and on the other of such things as ploughs and other implements of husbandry, horses, sheep and cattle, house furniture, clothes, arms, jewels and precious metals, all of which were known as chattels (*n*) or goods.

Chattels.

Physical
difference
between land
and moveable
goods.

Now there is a great physical difference between lands and chattels or goods. Land is immoveable and indestructible. You may dig holes in land and waste

(*z*) Bract. fo. 263 a; Co. Litt. 17 a; see Vinogradoff, *Villainage in England*, Essay ii., ch. iii.

(*k*) See the Boldon Book, Domesday, iv. 565 *et seq.*; Bract. fo. 35 b; Vinogradoff, *Villainage in England*, 322 *et seq.*

(*l*) Cunningham, *Growth of English Industry and Commerce*,

2—4, 16, 129, 166, 201.

(*m*) See *ante*, p. 4.

(*n*) Du Cange, *Gloss. subverb. Catalam*; New English Dictionary (Murray) s. v. Chat-tel and Cattle; Dial. de Scaccario, II. xiv.; Stubbs, *Select Charters*, 236, 2nd ed.

it, but you cannot remove the site of it. Goods on the other hand may always be removed or destroyed. Cows and sheep may be killed and eaten; furniture may be broken up and burnt (*o*). And this physical difference has great importance for the purposes of legal treatment. Land, for instance, must always remain subject to the jurisdiction of the courts of the country where it is situate, and amenable to the process, by which the judgments of such courts are enforced; it can never be withdrawn beyond the reach of the strong hand of the law. A landowner may fly from justice, but he must perforce leave his lands behind (*p*). Goods however may always be taken out of the country or destroyed, in order to avoid seizure by process of law. So that to one wrongfully dispossessed of land the law can always restore the very land from which he has been ejected: but there is no certainty of recovering by legal process the actual goods of which a man has been unlawfully deprived. If they have been lost or destroyed, the law can give the injured owner no other relief than to award him compensation in money. Again, land is permanent; it lasts beyond the life of man; the same land sustains successive generations of men. A landowner may die, but the land always remains to be enjoyed by some other; and from the nature of things, possession of land must be held by a succession of owners. But goods lack the permanent quality of land; they may always be worn out, destroyed or lost; they are not things which must necessarily endure beyond their owner's life. Lastly, in times when or in countries where men support themselves mainly by pastoral or agricultural pursuits, land is the most important kind of property. We shall see that the distinction made in our law between property in land and

(*o*) "*Terre demurt terre tout temps, mes biens come boeufs ou vache puit estre mange*"; Fitz. Abr. Villenage, pl. 22.

(*p*) The possession of freehold land was therefore regarded as a sufficient pledge for good behaviour; Bract. fo. 124 b.

property in goods arises from the physical difference between land and moveable goods, and from the superior importance of land at the time when the common law was in the making.

To re-state in words more indicative of its origin the distinction, that one may be the absolute owner of goods but can at most *hold* an estate in fee in land:—By English law moveable goods are the object of absolute ownership: but land is the object of tenure, that is, feudal tenure. Tenure may perhaps be defined as the relation between feudal lord and tenant of land.

Establish-
ment of
feudal tenure.

The principle of the feudal tenure of land was definitely established in our law after the Norman Conquest. It is well known that, after the battle of Hastings, the lands of those who opposed the Conqueror were treated as forfeited, and were granted by him to his own followers; while those of the English who submitted to him, redeemed their lands, surrendering them and receiving them again from his hands (*q*). In consequence of the revolts against William's authority, which took place in the first ten years of his reign, further forfeitures were incurred; so that, by a gradual process of confiscation and new grant, Normans were largely substituted for English, as the chief landowners over the whole kingdom (*r*). Now according to the construction placed by King William and his officers of justice upon the grants or regrants of land made by the king, whether to his own followers or to the former owners, the lands were not bestowed as absolute gifts: but were granted on the conditions of what is known as the feudal system of landholding (*s*).

The feudal
system of
landholding.

(*q*) Freeman, Norm. Conquest, iv. 18—22, 24, v. 22; Stubbs, Const. Hist. § 95. (*r*) Stubbs, Const. Hist. § 95; Freeman, Norm. Conquest, iv. 49, 56, 127, 128, 163, 296.

(*s*) On the continent of Europe the feudal system of landholding seems to have come to maturity in the course of the tenth century. It is thought partly to have originated in the grants of land made by the

That is to say, the grantees were regarded as holding the lands of the king as lord on the obligation of fidelity and service to him, in which if they failed, the lands would be forfeited and the king might resume them as his own (*t*). The service required of the grantees would in general be military service; that is, each would be bound to provide the king with a certain number of armed horsemen or knights, as part of the feudal host (*u*). Upon this system were lands held of

Frank kings of the three preceding centuries to their kinsmen and followers upon the grantees' undertaking to continue faithful. The estates so granted are known as benefices. Other elements of feudalism are found in the practice of commendation — that is, of men submitting themselves to some powerful neighbour as their lord and thereby gaining protection in return for faithful service, — and in the grants made by kings to powerful subjects of liberty of jurisdiction over the inhabitants of particular districts with immunity from the royal jurisdiction. The main features of the feudal system of tenures were (1) the principle that all land is held, either mediately or immediately, of the king; (2) the union of the relation of lord and man with that of landlord and tenant, whereby the personal service due from the vassal to his superior became the condition of his holding land granted to him by his lord; and (3) the jurisdiction of the lord over his tenants. The personal relation of lord and man was known to English law before the Norman Conquest. And it appears that English institutions were in other respects tending towards feudalism at the time of the conquest. But the introduction into English law of the feudal principle that all land is held of the Crown, and of the tenure of land by military service, seems to have been the immediate result of the Conquest and of William's dealings with the land. Although William introduced feudal tenure into England it should be noted that his policy was opposed to the introduction of feudal government. At the assembly held at Salisbury in 1086 he caused all his subjects, *whosoever men they were*, to swear fealty to him as their supreme lord. Hence arose an important difference between the English law of feudal tenure and that prevailing on the continent. The continental tenant owed fealty to his immediate lord only, and might well be summoned to go with his lord to war against the lord's superior, on pain of forfeiture, if he failed to comply. The English tenant did homage to his lord, saving his allegiance to the king; and did not forfeit his holding if he stood by the king against his lord. See Stubbs, Const. Hist. §§ 98—97; Freeman, Norm. Conq. iv. 694; Hallam, Middle Ages, i. 174, 175, and note; Glanv. ix. 1; Bract. fo. 80 a, 81 b; Litt. ss. 88, 89.

Benefices.
Commenda-
tion.

(*t*) Stubbs, Const. Hist. § 95. Freeman, Norm. Conq. iv. 27, v. 5, 23, 24.

(*u*) Before the Conquest land-owners were subject to the obligation of service in the *fyrd*, or national militia. The *fyrd* was not abolished at the Conquest, but

was retained, and used by the Norman kings, in addition to the feudal host; see Stubbs, Const. Hist. §§ 88, 48, 50, 75, 97, 133, vol. i. pp. 76, 105, 117, 189, 268, 482; Stubbs, Select Charters, 153, 2nd ed.

the Conqueror in Normandy by the great men who joined him in the expedition against Harold (v). And this system, it appears, was directly introduced into England by William I., at whose will the amount of knight-service due from the feudal tenants of the crown was determined (w). And not only was tenure by military service the condition of holding lands, which the king had granted to laymen, but the lands, which he had bestowed upon the bishops and abbots, as his feudal tenants, were also subjected to the obligation of providing definite numbers of knights (x). The law of military tenure, having been thus applied to the immediate tenants of the crown, spread quickly downwards; for the king's tenants, in order to provide permanently for knights to perform their service due to the crown, made gifts of land to their followers, as under-tenants, on condition of like military service as was required of themselves (y). And so speedily was the law of feudal tenure incorporated in the law of the land, that among the grievances to be redressed by the charter issued at the accession of Henry I., we find *abuse* during the late king's reign of the forms of feudal tenure, with respect to the lands not only of the king's immediate tenants, but also of their under-tenants (z). Under the influence of the king's court, of which judges were first appointed to sit permanently in Henry II.'s reign (a), the laws of tenure were further developed and reduced to uniformity; and all forms of land-owning, whether derived from the feudal-grants

(v) Round, English Historical Review, vi., 441; Stubbs, Const. Hist. § 92.

(w) This point is, I think, made good by Mr. Round in his articles on the introduction of knight service into England in the English Historical Review, vi. 417 and 825, vii. 11.

(x) The amount of knight service to be required from the

bishops and abbots appears to have been fixed by William in 1070; Round, Eng. Hist. Review, vii. 14.

(y) Round, Eng. Hist. Review, vii. 15, 19.

(z) Stubbs, Select Charters, 100, 2nd ed.; Round, Eng. Hist. Review, vi. 417.

(a) *Ants*, p. 8.

of King William and his tenants, or from Saxon usage which had survived the Conquest, were forced to fit the principle of feudal tenure. The law of tenure, however, was applied only to land. Chattels were not treated as fit objects of feudal tenure. The transient nature of goods and the uses to which they are commonly put, are opposed to any such arrangement. They were looked upon as objects of property simply. William I. took plenty of moveable wealth from his conquered subjects: but we do not hear that he granted any of it out to be held of him feudally, though we are told that he bestowed some of it as absolute gifts (*b*). So that, while a free man's land was subject to the interest which his feudal landlord had therein, his chattels were, as we shall see, property peculiarly his own, of which he could dispose at will (*c*)

SECTION III.

Of Tenements and Chattels.

Land then is the object of tenure. He who has land, is said to hold it rather than to own it (*d*). And in early times after the Conquest a parcel of land in any person's occupation, with its appurtenant rights in the way of common pasture or otherwise, was especially known as a tenement; a term then used generally in the mere sense of a holding of land without any reference to the nature of the tenant's interest therein (*e*). It must not, however, be supposed that in those days every occupier of land was a feudal tenant. Land might be held on other conditions besides those of

(*b*) Freeman, Norm. Conq. iv. 59—62.

(*d*) Co. Litt. 1.

(*c*) See Bract. 60 b, 129 a, 181 a, 407 b.

(*e*) Bract. fo. 77 b, 80 a, 907 a, 208 b, 220, 283.

feudal tenancy; and the most important kinds of tenancy were three. A man might have a freeholding of land (*liberum tenementum*), a holding in villenage (*villenagium*), or a lease for a certain number or *term* of years (*f*). A freeholding of land was held of the king or some mesne lord by free services, that is, by services free from servile incidents; military service, or knight's service, being in early times the most important kind of service by which land might be freely held (*g*). It was the freeholder who was the feudal tenant of land. To hold in villenage was to hold land of the freeholder on condition of the performance of villein services, which were chiefly services of field labour, as ploughing, sowing, reaping, and mowing, the amount of which was regulated by custom, and which often included incidents (*h*) then regarded as servile (*i*). To hold land for a term of years was to hold under a contract with the freeholder that the tenant should have possession of the land for a certain time (*k*).

Different incidents of freeholding, villenage and term contrasted with those of property in chattels.

Now the incidents of these three kinds of holdings of land, the freeholding, the villenage, and the term, were markedly different with respect, first to the protection which the law afforded to the tenant in the possession of his holding, and secondly, to the devolution of the holding after the tenant's death. As we examine these incidents, let us compare them with the same incidents of property in chattels.

Protection of possession.

1. Only the possession of a freeholding was fully protected by the common law (*l*). The dispossessed freeholder might always bring an action at law to recover

(*f*) Bract. fo. 207 a.

(*g*) See Glanv. xii. 2, 8; Bract. fo. 7 b, 24 b, 35, 36, 200 a.

(*h*) Such as the *merchet*, a fine paid by the villein tenant to his lord for the privilege of giving his child in marriage; see Vinogradoff, Villainage in Eng-

land, 158, 208; Pike, *Introd. to Y. B.*, 15 Edw. III. (Rolls Series), xv. *et seq.*

(*i*) Bract. fo. 7, 36, 200 a, 208 b.

(*k*) Bract. fo. 220 a.

(*l*) Glanv. i. 5, xii. 2-5, xiii. 82; Bract. fo. 165 a, 207 a, 481 b.

the holding of which he had been unjustly deprived; and would, if successful, be restored to possession of the same by the hands of the sheriff, the king's officer to whom was entrusted the execution of the judgments of the king's law court (*m*). The possession of a tenant in villenage was merely precarious in the eye of the law of the land. He was deemed to hold at the will and on behalf of his lord. No direct action for the recovery of a holding in villenage, as such, was ever permitted to be brought in the king's courts of law (*n*). Tenant for a term of years was regarded in early law as holding possession on behalf of the freeholder as his bailiff, and was never allowed to use the freeholder's remedies for dispossession (*o*). Originally he had no remedy in case of his ejectment, unless he held under a covenant (*oo*) with his landlord. If so, he might have an action of covenant against his landlord in case he had been ejected by the landlord himself or anyone claiming the land by superior title; and might recover, in the former case, possession of his holding for the rest of his term, if unexpired, but otherwise damages only (*p*). But afterwards special actions were given to a tenant for years against any person, who had wrongfully ousted him or acquired possession of his land from a wrongful ejector. And though at first it was doubted whether these

(*m*) See Glanv. i. 7, 12, 13, 16, 17, 21, 81; ii. 3, 4, 19, 20; xiii. 32—39.

(*n*) Tenant in villenage holding under a covenant with his lord seems to have been allowed to claim in the king's court such protection as was due to him by the covenant: but without such a covenant he was secured in the possession of his holding only by the force of local custom; and if his customary rights were invaded he could only appeal to his lord's court for redress. See Bract. fo. 7 a, 26, 168, 190 a, 200 a, 208 b, 210 b, 268; Fleta, fo. 220;

Litt. ss. 77, 172; Maitland, Select Pleas in Manorial Courts (Selden Society, vol. ii.), lxxii, 17, 22, 84, 87, 39, 166, 178; Vinogradoff, Villainage in England, 45, 46, 70—74, 78—81.

(*o*) Bract. fo. 27 a, 44 b, 165 a, 187 b, 190 a, 210 b, 431 b; Mirror, ch. 5, s. 1, No. 72.

(*oo*) A covenant is a contract made in writing authenticated by the seal of the contracting party; Fleta, fo. 130. Covenant.

(*p*) Bract. fo. 220 a; Bracton's Note Book, Case 1739; F. N. B. 145 L.

actions enabled him to recover anything but damages, in the reign of Edward the Fourth it was established that he should therein recover possession of his holding as well (*pp*). To the owner of chattels the law gave an action for goods wrongfully detained from him, in which he might have judgment to recover the goods or their value, if they could not be had. But in this action, unlike the actions to recover possession of a freeholding, there was no process given by the common law whereby the goods themselves could be attached and restored to a successful plaintiff. So that the defendant could always absolve himself by payment of the value of the goods in money (*q*).

Succession
after death.

2. Although a man might hold land freely, though he held, at least, for his life only, yet land, as the object of free feudal tenure, was especially a thing in which a man might have an inheritance. In English law after the Conquest, an estate held feudally was essentially an hereditary estate (*r*); it is to express an estate hereditary as well as feudal that the word *feodum* or *feudum* (*fief* in French, and in English *fee*) was used (*s*). Land held freely and as of inheritance (or as of *fee*, it was said (*t*)), passed on the tenant's death to his *heir*; that is, to the blood relation appointed by law to succeed him according to the legal rules of the descent of a fee. Thus, the

Fee.

(*pp*) See Bract. fo. 220; Y. B. 20 Edw. I. 282; Fitz. Abr. Ejectiones Firmarum, P. 6, Rich. II.; Y. B. 7 Edw. IV. 6; 21 Edw. IV. 11; F. N. B. 198, 220 F.; 3 Black. Comm. 200, 201, 207; Doe d. Poole v. Errington, 1 A. & E. 750, 755-757.
(*q*) See Glanville, lib. x. cap. 2, 13; Bract. fo. 102 b; Y. B. 14 Edw. III. 80; Com. Dig. Pleader, 2 W. 52, 2 X. 12; 3 Black. Comm. 418. In the year 1854 the law was altered, and process was given to enforce the return of any chattels wrongfully

detained; see Principles of the Law of Personal Property, 6, 18th ed.

(*r*) See Charter of Liberties issued by Henry I. at his coronation, cap. 2, 6; Stubbs, Select Charters, 100, 2nd ed.

(*s*) Glanville, lib. 1, c. 5; lib. 7, c. 10; lib. 9, c. 1, 4; lib. 10, c. 2, 3; Bract. fo. 13 b, 62 b, 84, 160 a, 195 b, 207 a, 263 b, 268, 434 b; Britton, liv. 2, ch. 1, § 2; Litt. s. 1; Co. Litt. 1 b.

(*t*) Bract. fo. 263 b, 264 a; Litt. s. 10; Co. Litt. 17 b.

eldest son of a tenant by knight's service succeeded as heir to the land of which his father died possessed. And the heir might by action at law recover the very land which descended to him as his inheritance, if the lord of the fee or any intruder wrongfully kept him out of possession (*u*). By the common law, moreover, freeholds of inheritance were not generally devisable by will; they were alienable only by formal delivery of the possession thereof in the tenant's lifetime (*x*). The succession to a holding in villenage after the tenant's death was not a matter in any way regulated by law. It might be customary for a son or other relation of the tenant to succeed him as heir (*y*): but the customary heir could not appeal to the king's courts against any infringement of his customary right (*z*). The interest of a tenant of land for a term of years was reckoned amongst his chattels after his death (*a*). Now the law of succession to chattels was based on principles entirely different from those which governed the descent of a fee. A man's chattels, as the objects of absolute dominion on his part, were after his death applicable first in payment of his debts. Of any surplus which remained he had the power of disposing of a reasonable part (*b*) by will; and the execution of such a will was committed by law to those persons whom the testator had appointed for the purpose, and who were called his executors (*c*). At Executor.

(*u*) Glanville, lib. 7, cap. 3; lib. 13, cap. 2, 3; Bract. fo. 62 b, 252 *et seq.*

(*x*) Glanville, lib. 7, c. 1, 5; Bract. fo. 39 b, 49 a.

(*y*) See Select Pleas in Manorial Courts, Selden Society, vol. ii., 8, 13, 24, 37, 39, 123, 166, 173; Vinogradoff, Villainage in England, 156, 159, 162, 172, 246.

(*z*) See Bract. fo. 263, 271 a, 272 a; Britton, liv. 3, ch. 15, § 2.

(*a*) Bract. fo. 407 b; and see fo. 131 a.

(*b*) One third, if he had a wife and child; one half, if he had wife or child; otherwise the whole; Bract. fo. 60 b, 61 a. In process of time, however, a man's widow and children lost their indefeasible rights to a share of his chattels, and anyone, though a husband and father, may now bequeath the whole of his chattels to whomsoever he will; see Principles of the Law of Personal Property, p. 417 *et seq.*, 13th ed.

(*c*) Glanville, lib. 7, cap. 5—8 Bract. fo. 60, 61.

first it does not appear that a man's executors succeeded to more than the residue of his chattels left after payment of his debts, his heir being liable to pay his debts and his chattels applicable to that purpose in the hands of his heir (*d*). But afterwards the payment of their testator's debts fell into the executors' hands as well as the distribution of the surplus of his chattels (*e*), and the whole of a testator's chattels devolved upon his executors. The ecclesiastical courts had jurisdiction over suits relating to the validity or execution of a will (*f*). And if a man died intestate, the administration of his goods was committed to the church (*g*), and performed, after the statute 31 Edw. III. c. 11, by an administrator deputed by the ordinary (*h*) from among the next friends of the deceased. So that the chattels of one who died intestate devolved on his administrator in the same manner as a testator's chattels passed to his executor. The interest of a tenant for a term of years was considered as his chattel, and therefore devisable by will (*i*). And, though it seems that in early times a man's heir might succeed to land given for a term of years to him and his heirs (*k*), yet ultimately the law of succession to a term was assimilated to that of other chattels; and it was settled that the interest of a deceased tenant for years should pass to his executor or administrator, according as he died testate or intes-

(*d*) See Assize of Northampton, c. 4; Stubbs, Select Charters, 151, 2nd ed.; Glanv., lib. 7, c. 5—8; Bract. fo. 60, 61; Selden, Titles of Honour, Pt. II. ch. v. § 21.

(*e*) See Fleta, fo. 125, 126, 135; Britton, liv. 1, ch. 29, s. 15; Y. B. 20 & 21 Edw. I. 374; 21 & 22 Edw. I. 258, 518; 30 Edw. I. 288.

(*f*) Glanv. lib. 7, c. 8; Bract. fo. 61 a, 407 b; Fleta, fo. 429, 430.

(*g*) Bract. fo. 60 b; stat. 13 Edw. I. c. 19; Fleta, fo. 124, 126.

(*h*) *I. s.*, "a bishop or any other that hath ordinary jurisdiction in causes ecclesiastical;" Co. Litt. 96 a. After the year 1857 the administrator of an intestate's effects was appointed by the Court of Probate. Since 1875 he has been appointed by the Probate Division of the High Court of Justice. See stats. 20 & 21 Vict. c. 77, s. 4; 36 & 37 Vict. c. 66, ss. 16, 24.

(*i*) Bract. fo. 131 a, 407 b.

(*k*) Bract. fo. 220 b, 407 b, 408 a; Fitz. Abr. Covenant, pl. 208.

tate, even though the land had been given for the term to him and his heirs (*l*). Here we may notice that the devolution of the surplus of an intestate's chattels, after payment of his debts, is quite different from the descent of a fee; as they are divisible amongst his widow and children or next of kin in the manner prescribed by a statute of Charles II. (*m*), enforcing a mode of distribution, which the ecclesiastical courts had previously attempted to secure (*n*).

Freeholdings of land then, or free tenements, were the only kind of property in land which was fully recognized and protected by the early common law. The word tenement thus acquired, besides its general meaning of a holding of land, a special sense in which it was used to denote a free tenement only (*nn*). And the words "lands" or "lands and tenements" were constantly used as referring to freehold lands only (*o*). So that property in the times of the early common law was classified as consisting of immoveable things, as tenements (meaning free tenements), on the one hand, and moveable things, as chattels, on the other (*p*). As anything which may descend to the heir is in English law called a hereditament (*q*), lands and tenements were also known as hereditaments. And the expression "lands, tenements and hereditaments" was long and is

Hereditament.

(*l*) Bro. Abr. Chattels, pl. 6; Litt. s. 740; Co. Litt. 46 b.

(*m*) Stat. 22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 3, s. 25; 1 Jac. II. c. 17, s. 7.

(*n*) See 1 Sir T. Raym. 497—499; 2 Black. Comm. 515.

(*nn*) Magna Charta of John, art. 24; Stubbs, Select Charters, 301, 2nd ed.; stats. 6 Edw. I. c. 11, 12; 13 Edw. I. c. 1, 3, 4, 6, 10, 32, 41; Co. Litt. 6 a.

(*o*) Charter of Liberties of Henry I., art. 2, 4; Stubbs, Select Charters, 100, 101, 2nd ed.; Glanville, lib. 7, c. 1, 17; Magna

Charta of John, art. 4, 5, 9, 32; Stubbs, Select Charters, 297 *et seq.*, 2nd ed.; stats. 13 Edw. I. c. 18; 18 Edw. I. c. 1; 25 Edw. III. st. 5, c. 2; 34 Edw. III. c. 12.

(*p*) Glanville, lib. 10, c. 6; stat. 13 Edw. I. c. 8, 10.

(*q*) Co. Litt. 6 a; *Tomkins v. Jones*, 22 Q. B. D. 599. This word seems hardly to have come into use before the reign of Edw. IV.; see stats. 39 Henry VI. c. 1; 1 Edw. IV. c. 1, ss. 4—6, 10, 14. I have not found any earlier instance of its use in the statute book.

still used in legal documents to describe property in land, as distinguished from goods and chattels or moveable property. But as by early law freeholdings were the only true property in land, when a man spoke of his lands, tenements, or hereditaments, it was intended, *prima facie*, that he referred to his freeholds only (*r*).

SECTION IV.

Of Real and Personal Actions and Property.

To recapitulate the points of contrast between land and moveable goods or chattels in early law:—Land was the object of fental tenure. The largest property which a subject could hold in land was a fee, which must inevitably descend to his heir if he died possessed thereof. The only true property in land was freehold, for free tenements only were specifically recoverable, the law regarding the possession of a tenant in villenage as enjoyed at the will of his landlord, and that of a termor as matter of contract rather than of property. Chattels were the object of absolute ownership. They might be disposed of by will, and would go to the executor or administrator, not the heir. But they were not specifically recoverable, because one who wrongfully detained chattels, might absolve himself by payment of their value in money. The fact, that originally freeholds were the only property specifically recoverable, is the reason why they came to be called real things. For the word *real* in English law is used

Meaning of
word *real* in
law.

(*r*) Year Book, 9 Henry VII.
25; Bro. Abr. Done, 41; Bro.
Abr. Grantes, 87; Shepp. Touch.
91, 92; *Rose v. Bartlett*, Cro. Car.
292; *Chapman v. Hart*, 1 Ves.

271; *Thompson v. Lawley*, 2 Bos.
& P. 303; 1 Jarm. Wills, 668,
664, 667, *et seq.*, 4th ed.; stat. 7
Will. IV. & 1 Vict. c. 26, s. 26.

not in its common sense, in which it is opposed to sham, or imaginary, or ideal, but principally to convey the notion of the capability of specific restitution.

The terms *real* and *personal* were first applied to actions; and were afterwards extended to things and property with the meanings which they had acquired in connection with actions. Actions in English law were classified as being either real, personal, or mixed. The term real action is simply a translation of the expression *actio realis* used by early writers on English law as equivalent to the term *actio in rem*, which Bracton borrowed from Roman law (*s*). Real actions in English law (*t*) were those in which a man sought to be restored to the enjoyment of some free tenement of which he had been unjustly deprived (*u*). The mark of a real action was that therein the required restitution might be enforced by the strong hand of the law dealing directly with the very thing claimed; in other words, process of execution (*x*) might issue against the thing demanded (*in rem*). The successful litigant in a real action could have the king's writ commanding the sheriff to put him in possession of the identical holding in respect of which the action had been brought (*y*). Personal actions were brought to enforce an obligation imposed on a man personally to make

Real and
personal
actions.

(*s*) Bracton, fo. 101 b, 159 b; Fleta, fo. 1.

(*t*) In English law real actions were distinguished from personal by the different nature of the relief afforded thereby, and were not classified, as were the *actiones in rem vel in personam* of Roman law, according to the nature of the right therein asserted; see an article by the present writer in the Law Quarterly Review, vol. iv., p. 394.

(*u*) See *ante*, p. 18.

(*x*) Process of execution is the Process of process of law whereby the *execu-* execution.

tion of the judgment of a court of law is obtained; and consists in issuing a writ to the sheriff (see *ante*, p. 17), commanding him to cause such things to be done as shall give effect to the judgment; see Black. Comm. iii. 412, iv. 403; R. S. C. 1888, Order XLII. and App. G, H.

(*y*) Glanv. i. 7, 12, 18, 16, 18, 21, 31; ii. 8, 4, 19, 20; iii. 8—6, 9; xiii. 7—9, 32—39; *ante*, p. 17.

satisfaction for a breach of contract or a wrong; in other words, they were brought to obtain pecuniary compensation for a violation of right — what the English law calls damages (*z*). Mixed actions were those in which a claim for damages was made along with a claim for the specific recovery of some tenement (*a*). Now it was established in Bracton's time that specific restitution could only be obtained in actions for the recovery of immoveable things, or tenements. In actions for the recovery of moveable things, the defendant might always absolve himself by payment of their value in money, if the things themselves were not forthcoming. Actions for the recovery of moveable things were accordingly numbered amongst personal actions; for damages only could be recovered with any certainty therein (*b*). Real actions then being for the specific recovery of lands or tenements, and personal actions for the recovery of damages, actions were said to be or to *sound* in the *realty* or in the *personalty*, according as the relief afforded therein were the specific recovery of some thing by process of execution issuing against the very thing demanded, or the recovery of damages against the person of a wrongdoer (*c*). The word *realty* was also used to denote things recoverable in the realty, or specifically; that is, lands and tenements (*d*). Such things were also called things real (*e*). Things recoverable in the personalty, or by action and process against the person who wrongfully withheld them, as moveable goods, debts, damages, and the like, were termed things personal (*f*).

Realty and
personalty.

Things real.

Things per-
sonal.

(*z*) See Bract. fo. 102, 114 b; Litt. ss. 492, 502, 503; Co. Litt. 288 b, 289 a; Black. Comm. ii. 438, iii. 117; Bac. Abr. tit. Damages, Trespass.

(*a*) Bract. fo. 102 b, 114 b; Britton, liv. 3, ch. 7, § 1.

(*b*) See Glanville, x. 13; Bract. fo. 102 b; Termes de la Ley, tit. *Action mixt*; 3 Black.

Comm. 146, 418.

(*c*) Britton, liv. 2, ch. 1, liv. 3, ch. 7; Litt. ss. 815, 816, 492, 508; Co. Litt. 195 b, 285 a, 288 b, 289, a; Year Book, 8 Edw. IV. 13.

(*d*) Litt. s. 500; Co. Litt. 19 b, 20 a, 118 b.

(*e*) Co. Litt. 288 b.

(*f*) Litt. ss. 496, 497; Year

Originally, as we have seen (*g*), freeholds were the ^{Realty equivalent to} only things specifically recoverable in the King's freehold. Court; all that could be included in "the realty." Thus the word *realty* came to be used as denoting the freehold (*h*). After this, those interests in land which were reckoned as chattels were distinguished by the name of chattels *real*, because, it was said, they concerned the realty; while the name of chattels *personal* was given to moveable goods, "because for the most part they belong to the person of a man, or else" (which seems the better reason) "for that they are to be recovered by personal actions" (*i*). As freeholds descended to the heir, while chattels passed to the executor, the notion of descent to the heir became associated with the realty, as well as the idea of land specifically recoverable; and the incident of passing to the executor became a characteristic of the personalty. So that in later times, when men began to ^{Use or the terms real and personal estate.} describe property as consisting of real and personal estate instead of by the old terms *lands, tenements, and hereditaments* and *goods and chattels* (*k*), only things inheritable as well as specifically recoverable, only *real hereditaments*, in fact, were classed as real estate; and chattels, whether real or personal, were considered as personal estate rather on the ground of their passing to the executor than with reference to the question, how far they were specifically recoverable (*l*). It does not appear that the expressions *real*

Chattels real and personal.

Real hereditaments.

Book. 21 Edw. IV. 83, pl. 38; Co. Litt. 198 a, 298 b. It does not appear that the term *things personal* was so used as to include chattels real; see Wentworth's Office of an Executor (ed. 1641), Tab. I. ch. 4, 10, pp. 64, 70, 130—132; Cro. Car. 293.

(*g*) *Ante*, p. 16.

(*h*) See Litt. s. 500; Co. Litt. 20 a; 5 Rep. 105 b.

(*i*) Co. Litt. 118 b; see Old

Tenures, fo. 2 b; Litt. ss. 281 319—324, 365; 1 Rolle Abr. Executor (H. 1). It is worthy of note that chattels real were things specifically recoverable; see Co. Litt. 43 b, 199 b; Bac. Abr. Guardian (T); *ante*, p. 17.

(*k*) See *ante*, pp. 21, 22.

(*l*) See Cro. Car. 62; 1 Ch. Ca. 16; *Davis v. Gibbs* (1729), 2 P. W. 26, 28; *Whitaker v. Ambler* (1768), 1 Eden, 151, 152.

and personal estate came into common use much earlier than the reign of Charles II. (m). By that time great changes had occurred both in the character of the national wealth and in our land laws. The development of modern commerce and modern capital had commenced. Payment for services was no longer made in terms of land, but in money. Tenure, the relation between feudal landlord and tenant, while remaining in form, had greatly diminished in real importance; the freeholders of land had, in fact, secured all the advantages of absolute ownership, except the form. By an Act passed at the restoration of King Charles II. military tenures had been finally abolished (n); a measure which relieved freeholders from all the oppressive incidents of feudal tenure, and reduced to a *minimum* the interests of lords in their freeholding tenants' lands. The same Act, too, extended to land-owners generally the full liberty of disposing of their fees by will, a privilege before enjoyed only by the more favoured classes among them (o); though free power of alienation *inter vivos* had been much earlier obtained (oo). And while a freehold in fee had come to be well nigh equivalent to absolute property, other forms of property in land, besides freehold, had acquired

(m) Mention is found of personal estate and also of real estate in reports of cases decided in Chancery in the time of Charles I.; see 1 Ch. Rep. 15, 25, 42, 71, 73, 82; Cro. Car. 62. In Charles II.'s reign the terms *real and personal estate* were in common use in wills and in the Court of Chancery; see 1 Ch. Ca. 16, 91; 1 Vern. 3, 15, 23, 30, 86, 184, 216, 271. By the commission of sequestration, which was part of the process then issued against persons who acted in contempt of the orders of the Court of Chancery, the sequestrators were authorized to take and keep in sequestration all the *real and personal*

estate of the party in contempt; see *Hide v. Pettit* (1687), 1 Ch. Ca. 91; Brown's Tutor in Chancery (1688), pp. 841, 861; Praxis Almæ Curie Cancellariæ (1694), 89—91.

(n) Stat. 12 Car. II. c. 24.

(o) Tenants of fees held in gavelkind, or in burgage where there was a custom to devise the land; and tenants in socage by stats. 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5, which also empowered tenants by knight's service to dispose of two thirds of their fees. See *ante*, p. 19; and *post*, ch. x.

(oo) By stat. 18 Edw. I. c. 1.

full recognition and protection in law. Tenure in villenage, as such, had become extinct, but had given rise to the customary tenure known as copyhold. And the right of the copyholder to maintain or recover possession of his holding as against all others had become enforceable by the law of the land (*p*). As we have seen (*pp*), the leaseholder had acquired a similar right. So that copyhold and leasehold interests in land had come to be true property in land as well as freeholds. When, therefore, men began to speak of all their valuable rights as their estate (*q*), and to classify their estate as real or personal, property was no longer contained in the simple forms, which had rendered possible the early classification of immoveable tenements and moveable chattels (*r*). And questions arose, on which side of the line the newer forms of property should be ranged. The term *real estate* seems to have been considered as referring primarily to freeholds; yet it was thought to be an apt word to describe copyholds also, where an intention to include them could be inferred (*s*). For copyholds are lands transmissible to heirs; since the copyholder may by custom recognized in law have an estate inheritable by his customary heir, as the freeholder may have an estate inheritable by his heir at common law. By modern statutes, copyholds have been further assimilated to freeholds as regards the incidents of ownership (*t*); and they are now plainly held to be included

(*p*) See *post*, Part III.

(*pp*) See *ante*, p. 18.

(*q*) See *ante*, p. 25.

(*r*) *Ante*, p. 21.

(*s*) See *Smith v. Baker* (1787), 1 Atk. 885; *Ithell v. Beane* (1748-9), 1 Ves. 215; *Byas v. Byas* (1750-1), 2 Ves. 164; *Dod v. Dod* (1765), Ambl. 274; *Judd v. Pratt* (1808), 15 Ves. 390; *Church v. Mundy* (1808), *ib.* 396; *Torres v. Brown* (1854), 5 H. L. C. 556, 571.

(*t*) By stat. 55 Geo. III, c. 192, copyholds were made devisable by will without the formalities previously necessary; and by stats. 3 & 4 Will. IV. c. 104; 1 & 2 Vict. c. 110, s. 11, they were made liable to be taken to satisfy their owner's debts; a liability, which had previously attached to them only in the case of his bankruptcy; stat. 18 Eliz c. 7, s. 2.

in real property or estate (*u*). Leaseholds, however, though said to be chattels real as being derived out of real estate, were not permitted to rise beyond their chattel origin and to rank as real estate (*v*); devolving upon the executor, not the heir, they fell into the class of personal estate (*x*).

In modern times then, a man's property or estate (meaning his valuable things (*y*)) is classified as real or personal. Things specifically recoverable, which go to the heir, or real hereditaments, are real estate. Personal estate comprises all chattels, which go to the executor (*z*), be they chattels *real*, that is, chattel interests in land, or chattels *personal*, namely moveable goods and other things, for the withholding of which damages only are recoverable. It may be noted that personal estate, as well as real, now includes many forms of property which were unknown to the early law, such as stock in the public funds and shares in joint stock companies. These modern forms of property were in most cases created or sanctioned by Act of Parliament, and it was

Personal
hereditament.

(*u*) *Doe d. Clarke v. Ludlam* (1881), 7 Bing. 275; *Edwards v. Barnes* (1835), 2 Bing. N. C. 252; *Reeves v. Baker* (1854), 18 Beav. 372, 382; *Torre v. Brown* (1855), 5 H. L. C. 555, 574; *Seaman v. Woods* (1857), 24 Beav. 372.

(*v*) *Holt, C. J., Countess of Bridgewater v. Duke of Bolton* (Hil. 2 Anne), 6 Mod. 106, 107; *Hardwicke, C. Smith v. Baker* (1787), 1 Atk. 385, 388; *Whitaker v. Ambler* (1758), 1 Eden, 151; *Parker v. Marchant* (1843), 5 Man. & Gr. 498; 2 Y. & C. C. C. 279; *Turner v. Turner* (1852), 21 L. J. Ch. 848; *Swift v. Swift* (1859), 1 De G. F. & J. 160, 178; *Butler v. Butler* (1884), 28 Ch. D. 66.

(*x*) *Lee v. Hale* (1662-3), 1 Ch. Ca. 16; *Davis v. Gibbs* (1729), 3 P. W. 26; *Thompson v.*

Lawley (1800), 2 B. & P. 303; *Prescott v. Barker* (1874), L. R. 9 Ch. 174, 190. But at first a lease seems to have been considered a real thing rather than a personal thing; *Rose v. Bartlett* (7 Car. I.), Cro. Car. 292, 293.

(*y*) *Ante*, pp. 4, 5.

(*z*) It may be mentioned that there is such a thing as a personal hereditament, a thing recoverable in the personalty, but going to the heir, not the executor; of which an annuity granted to a man and his heirs, and not charged on any land, is an instance. Such things are held to be included in personal, not real, estate. See Year Book, 2 Edw. IV. 83, pl. 38; *Earl of Stafford v. Buckley*, 2 Ves. 171; *Aubin v. Daly*, 4 B. & A. 59; *Redburn v. Jarvis*, 8 Beav. 450, 461.

generally declared that they should be considered as personal estate, and should go to the executors or administrators, not the heirs, of the parties entitled to them (a). The true nature of government stock as a mere right of action in the personalty has also been judicially declared (b). By later decisions, a share in a joint stock company has been ascertained to be a right of the same kind (c), a mere right to share in the profits of the company, and not to be an interest in land, though the company be landholders (d).

It has been previously mentioned that things are in English as in Roman law distinguished as corporeal or incorporeal (e). In our law this classification is particularly applied to hereditaments. Corporeal hereditaments, the land in the freeholder's possession, are contrasted with incorporeal hereditaments, mere rights to or over land, which is in another's possession (f). For example, a right to enjoy land in fee upon the determination of the interest of another, who is in possession thereof for his life or for a term of years, is a mere right regarded in law as an incorporeal thing (g). So is the

Hereditaments, corporeal or incorporeal.

(a) See stats. 8 & 9 Will. III. c. 20, s. 38, as to stock in the Bank of England; 9 & 10 Will. III. c. 44, s. 71, as to shares in the East India Company; 1 Geo. I. st. 2, c. 19, s. 9, as to Government annuities; 8 & 9 Vict. c. 16, s. 7; 25 & 26 Vict. c. 89, s. 22.

(b) *Dundas v. Dutens* (1790), 1 Ves. jun. 198, 198; *Wildman v. Wildman* (1808), 9 Ves. 174, 177; *R. v. Capper* (1817), 5 Price, 217, 263, 264.

(c) *Humble v. Mitchell* (1839), 11 A. & E. 205; *Colonial Bank v. Whinney* (1885), 80 Ch. D. 261, 286, 11 App. Cas. 426, 439, 446, 447.

(d) *Bligh v. Brent* (1836), 2 Y. & C. 268, 294; *Sparling v. Parker* (1846), 9 Beav. 450; *Walker*

v. Milne (1849), 11 Beav. 507; *Myers v. Perigal* (1852), 2 De G. M. & G. 599, 620, 621; *Edwards v. Hall* (1855), 6 De G. M. & G. 74; *Entwistle v. Davis* (1867), L. R. 4 Eq. 272. But shares in the New River and in one or two more of the older companies are real estate, see *Drybutler v. Bartholomew* (1723), 2 P. W. 127; *Buckridge v. Ingram* (1795), 2 Ves. jun. 652.

(e) *Ante*, p. 4.

(f) Bract. fo. 52, 220 b, 221; Britton, liv. 2, ch. 2, § 1.

(g) Bract. fo. 8 a, 7 b, 81, 89 a, 160 a, 264 b; Britton, liv. 2, ch. 2, § 1, ch. 9, §§ 1, 5; Fleta, fo. 201; Litt. ss. 444, 445, 459, 465, 532, 533, 567—575, 606—618.

Feoffment,
with livery of
seisin

right to enjoy in fee land, of which another is wrongfully in possession (*h*). Other instances of incorporeal hereditaments are a right of common of pasture, which is the right, enjoyed in common with others, to depasture cattle on another's land; a right of way over another's land; a rent granted to a man and his heirs to issue out of another's land; and an advowson, which is the perpetual right of presentation to an ecclesiastical benefice (*i*). The contrast is between the estate of one, who is possessed of the land, the tangible thing, and that of a man who has the mere right, the intangible thing, without possession of anything tangible (*k*). The distinction between corporeal and incorporeal hereditaments was emphasised by a difference in the mode of alienation. The former were at common law alienable by *feoffment*, that is, by gift of a fee or feudal estate, coupled with *livery of seisin*, or formal delivery of possession (*l*). And such rights over others' land as appertained to a holding of land were transferred with it by delivery of the possession of the holding. Thus a right of way or of common enjoyed in respect of any land, or an advowson enjoyed in right of the possession of a manor would pass, without express mention, by delivery of possession of the land or manor. But if it were desired to alienate any incorporeal hereditament alone, apart from the possession of any land, as such things are incapable of delivery, other means of transfer had to be employed (*m*). The most obvious of these was writing; which accordingly came to be necessary to the transfer of incorporeal hereditaments by

(*h*) Bract. fo. 262 b, 434 b; Litt. s. 466, 521, 531, 534; Co. Litt. 269 a.

(*i*) Bract. fo. 52 b, 53 a, 222; Britton, liv. 2, ch. 3, § 13, ch. 10.

(*h*) See *ante*, p. 5.

(*l*) Glanville, lib. 7, c. 1;

Bract. fo. 39 b; Britton, liv. 2, ch. 2, § 10; Litt. ss. 56, 69, 70; Co. Litt. 9 a, 48 a.

(*m*) See Bract. fo. 52 b—55 b, 102, 222 a; Britton, liv. 2, ch. 8, § 4, ch. 10, § 15; Litt. ss. 183, 184; Co. Litt. 121 b.

themselves (*n*). While therefore corporeal hereditaments were long transferable by mere delivery of possession without any written words, the proper mode of disposing of incorporeal hereditaments alone, according to the common law, was by delivery of a sealed (*o*) writing or *deed* of grant. Hence, corporeal hereditaments were said to lie in livery (that is, delivery), incorporeal in grant (*p*). We may note that such incorporeal hereditaments as a right of common or of way, a rent or an advowson, were specifically recoverable by the common law (*q*), and were therefore included in the realty as well as corporeal hereditaments (*r*).

We have now seen that property in land is not all real property, but is either real or chattel real; and that copyholds as well as freeholds are now included in real property; while leaseholds are the most important chattels real. But to enjoy the highest and most beneficial form of landowning known to the law, one must have a freehold in fee (*s*). † Copyhold and leasehold estates in land are less advantageous, as the reader will discover. Copyholds and chattels real are moreover interests in land devised out of the estate of the freeholder (*t*), for there is no land without a freeholder. For these reasons, it is proposed here to examine first freehold estates in land, leaving the subject of copyholds and leaseholds for subsequent consideration. And we will begin by inquiring into the case of those freeholders, who have estates in land in possession, or corporeal hereditaments (*u*).

(*n*) See Britton, liv. 2, ch. 8, § 13, ch. 23, § 8.

(*o*) Sealing was required by the common law as a guarantee of authenticity. Therefore whenever the common law requires anything to be evidenced by writing, a sealed writing is required; Fleta, fo. 130.

(*p*) Litt. s. 188, 541, 542, 551, 618, 628; Co. Litt. 9 a b, 121 a b.

(*q*) See Glanville, lib. iv., xii. c. 18, xiii. c. 18, 37; Bract. fo. 230 b—232 b, 237 b, *et seq.*, 482 a; Britton, liv. 2, ch. 23, § 1; Litt. ss. 238, 236.

(*r*) See *ante*, p. 25; Co. Litt. 20 a.

(*s*) Litt. ss. 11, 238.

(*t*) See *ante*, p. 16.

(*u*) *Ante*, p. 29.

Real and
chattel-real
property.

PART I.

OF CORPOREAL HEREDITAMENTS.

Terms of the law.

A messuage.

Tenement.

BEFORE proceeding to consider the estates which may be held in corporeal hereditaments or landed property, it is desirable that the legal terms made use of to designate such property should be understood; for the nomenclature of the law differs in some respects from that which is ordinarily employed. Thus a house is, by lawyers generally called a *messuage*; and the term *messuage* was formerly considered as of more extensive import than the word *house* (a). But such a distinction is not now to be relied on (b). Both the term *messuage* and *house* will comprise adjoining outbuildings, the orchard, and curtilage, or court-yard, and, according to the better opinion, these terms will include the garden also (c). The word *tenement* is often used in law, as in ordinary language, to signify a house: it is indeed the regular synonyme which follows the term *messuage*; a house being usually described in deeds as "all that messuage or tenement." But the more comprehensive meaning of the word *tenement*, to which we have before adverted (d), is still attached to it in legal interpretation, whenever the sense requires (e). Again

(a) *Thomas v. Lane*, 8 Ch. Ca. 26; Keilw. 57.

(b) *Doe d. Clements v. Collins*, 2 T. Rep. 489, 502; 1 Jarman on Wills, 779, 4th ed.

(c) *Shep. Touch.* 94; Co. Litt. 5 b, n. (1); *Smithson v. Cage*, Cro. Jac. 526; *Lord Grosvenor*

v. Hampstead Junction Railway Company, 1 De Gex & Jones, 446; *Cole v. West London and Crystal Palace Railway Company*, 37 Beav. 242; see Williams's Conveyancing Statutes, 62.

(d) *Ante*, pp. 15, 21.

(e) 2 Black. Comm. 16, 17, 59.

the word *land* comprehends in law any ground, soil, or Land. earth whatsoever (*f*); but its strict and primary import is arable land (*g*). It will, however, include castles, houses, and outbuildings of all kinds; for the ownership of land carries with it everything both above and below the surface, the maxim being *cujus est solum, ejus est usque ad cælum*. A pond of water is accordingly described as *land* covered with water (*h*); and a grant of land includes all mines and minerals under the surface (*i*). This extensive signification of the word *land* may, however, be controlled by the context; as where land is spoken of in plain contradistinction to houses it will not be held to comprise them (*k*). So mines lying under a piece of land may be excepted out Mines. of a conveyance of such land, and they will then remain the corporeal property of the grantor, with such incidental powers as are necessary to work them (*l*), and subject to the incidental duty of leaving a sufficient support to the surface to keep it securely at its ancient and natural level (*m*). In the same manner, chambers Chambers. may be the subjects of conveyance as corporeal property, independently of the floors above or below them (*n*). The word *premises* is frequently used in law in its Premises. proper etymological sense of that which has been before mentioned (*o*). Thus, after a recital of various facts in a deed, it frequently proceeds "in consideration of the

(*f*) Co. Litt. 4 a; Shep. Touch. 92; 2 Black. Comm. 17; *Cooke*, dem., *Fata*, vouchee, 4 Bing. 90.

(*g*) Shep. Touch. 92.

(*h*) Co. Litt. 4 b.

(*i*) 2 Black. Comm. 18.

(*k*) 1 Jarman on Wills, 777, 4th ed.

(*l*) *Earl of Cardigan v. Armistage*, 2 Barn. & Cress. 197, 211.

(*m*) *Humphries v. Brogden*, 12 Q. B. 789; *Smart v. Morton*, 5 E. & B. 30; *Rogers v. Taylor*, 2 H. & N. 828; *Roubootham v. Wilson*, 8 E. & B. 128, affirmed

W.R.P.

8 H. of L. Cas. 348; *Bonomi v. Backhouse*, E. B. & E. 622, affirmed 9 H. of L. Cas. 508; *Dugdale v. Robertson*, 8 Kay & J. 696; *Stroyan v. Knowles*, 6 H. & N. 454; *Smith v. Darby*, L. R., 7 Q. B. 716; *Davis v. Treharne*, 6 App. Cas. 430; *Dixon v. White*, 8 App. Cas. 838; *Love v. Bell*, 9 App. Cas. 286.

(*n*) Co. Litt. 48 b; Shep. Touch. 206. See 12 Q. B. 787.

(*o*) *Doe d. Biddulph v. Meakin*, 1 East, 456; 1 Jarman on Wills, 778, 4th ed.

premises," meaning in consideration of the facts before mentioned; and property is seldom spoken of as *premises*, unless a description of it is contained in some prior part of the deed. Most of the words used in the description of property have however no special technical meaning, but are construed according to their usual sense (*p*); and, as to such words as have a technical import more comprehensive than their ordinary meaning, it is very seldom that such extensive import is alone relied on: but the meaning of the parties is generally explained by the additional use of ordinary words.

(*p*) As farm, meadow, pasture, &c.; Shep. Touch. 93, 94.

CHAPTER I.

OF FREE TENURE.

SECTION I.

Of the Origin of Free Tenure.

A FREEHOLDER, who is possessed of land for an estate in fee simple (a) is said to be seised thereof in his demesne as of fee (b). For to be seised of a thing is to be possessed thereof, the word *seisin* meaning Seisin. possession; and land in the freeholder's own occupation is said to be in his demesne (c). The words *seised* and *seisin* were originally used to describe any kind of possession, whether of land or chattels, or even of a mere right (d). But afterwards they came to be used in a limited sense, to express the possession of a free holding, that possession which alone was recoverable in a real action (e). Now the estate of the freeholder seised of land in his demesne as of fee may be considered in two aspects: first, as regards the lord of whom he holds his land; secondly, as regards all other persons.

(a) See *ante*, p. 6.

(b) Bract. fo. 255 b; Litt. s. 10.

(c) Bract. fo. 263 a; Co. Litt. 17 a. As the early law did not recognise the possession of a termor, or a tenant in villenage, land occupied by one or the other was considered in law to remain in the freeholder's demesne. So that to this day the freeholder is seised in his demesne of the land occupied by his leasehold or copy-

hold tenants: though they can now obtain complete legal protection of their own interests; see *ante*, pp. 17, 18, 27; Vinogradoff, Villainage in England, 223.

(d) See Maitland, Seisin of Chattels, Law Quarterly Review, Vol. I. p. 324; Bract. fo. 206, 252 a, 264 a; Litt. ss. 10, 183, 217, 238, 541, 567; Co. Litt. 369 b.

(e) Litt. s. 324; Co. Litt. 17 a, 200 b; see *ante*, pp. 16, 23.

It is proposed first to discuss the relation between the freeholder and his lord, or the free tenure (*f*) of land. For, although in modern legal practice the relation of lord and freeholding tenant is rarely brought into the light, yet the law of tenure determined the form of our present land law. And so long as the form of tenure remains, it is of the first importance that the student should understand the principles which determined its rules.

Principle of tenure introduced by William I.

It has been already mentioned that the first principle of feudal tenure, that all land is held of the crown, was practically introduced into English law by William the Conqueror (*g*), whose grants were construed as conferring a new title to the land (*h*). The grants or regrants of great landed estates made by him to his own followers or to the former owners were interpreted by the royal officers of justice to confer upon the grantees an estate held feudally of the king; so that they became the king's tenants *in capite*, that is, his immediate tenants. The estates so conferred appear to have been estates of inheritance, passing as of right to the heirs of deceased grantees. For the hereditary character of a fief (*i*) had been recognized on the Continent before the Norman Conquest (*k*); so that to the Normans an estate held feudally would be essentially a hereditary estate. And at the very beginning of Henry I.'s reign we find fees established as estates of inheritance in England (*l*).

Tenants *in capite*.

Origin of incidents of free tenure.

The present incidents of free tenure owe their existence to the dealings with free holdings of land,

(*f*) *Ante*, p. 12.

(*g*) *Ante*, pp. 12—14.

(*h*) Bracton says (fo. 389 b) that the king is not bound to warrant the gift of his predecessors who reigned before the Conquest, for he is not their heir, unless he should have bound himself to

warranty by confirmation.

(*i*) *Ante*, p. 18.

(*k*) Stubbs, Const. Hist. § 98, vol. i. p. 254, 2nd ed.

(*l*) See the Charter of Liberties issued by Henry I. at his coronation; Stubbs, Select Charters, 100, 101, 2nd ed.

which took place between the reign of William the Conqueror and that of Edward I. The relation of feudal landlord and tenant seems to have been essentially restrictive of alienation on the tenant's part: but in England the right of a tenant in fee to alienate his holding without his lord's consent was gradually established (*m*). The steps by which this was accomplished will be described in the next chapter. It is sufficient to say here that it appears that, as a matter of fact, alienation by feudal tenants must have begun soon after the Conquest (*n*); and it is certain that before the close of the period referred to alienation had extensively prevailed (*o*). During this time, however, the alienation of land was rarely accomplished by a transfer of all the owner's rights therein, such as we are accustomed to at the present day, but was usually effected by *subinfeudation*; that is, by the grant of a fee to the grantee and his heirs to be held by them as tenants of the grantor and his heirs. Upon the subinfeudation of a holding the grantor and his heirs remained the tenants of their own superior lord, and a new tenure (*p*) was created between the grantor and the grantee, the former becoming a mesne lord (*q*) between his new tenant and his own superior lord (*r*). The relation of feudal landlord and tenant thus entered into was one of mutual obligation. The lord was mainly bound to warrant his tenant's title to the lands bestowed, and to give him lands of equal value if he was ejected by any one who showed a superior title (*s*). The tenant was

(*m*) See Bract. p. 45 b, 46 b, 263 b.

(*n*) Note the large number of instances in Domesday in which *maneria* described as part of the estates of the King's tenants *in capite* are held of them by named undertenants; and see English Historical Review, vii. 15, 19.

(*o*) The Hundred Rolls bear witness to this.

(*p*) See *ante*, p. 12.

(*q*) See *ante*, p. 7, n. (*s*).

(*r*) Thenceforward the grantor was no longer seised of the land *in his demesne*; but he was said to hold or be seised of the land *in service*, and was regarded as retaining a substantial interest therein; Bract. fo. 80, 81, 268.

(*s*) See Glanville, ix. 4; Bract. fo. 37, 80 b, 380 b, 381 b.

bound to fealty to his lord, and to do him the services stipulated for on the bestowal of the holding. Thus the nature and amount of the services which could be required of freeholding tenants were determined by the agreements made between lords and tenants, or their respective predecessors, when the tenure between them was created by the gift to the latter of fees to be held of the former; and these services were of innumerable kinds (t). Under the influence of the king's court a classification of tenures was gradually accomplished, as we shall see. This was hardly effected, however, before the power of subinfeudation was altogether taken away. By the statute 18 Edw. I. c. 1, called from its opening words this statute of *Quia Emptores*, liberty was given to every free man, who was a tenant in fee simple of land, to sell his holding or part thereof at will (u), so nevertheless that the alienee should hold the land of the same immediate lord and by the same services as the alienor held it before. Thenceforward it has been impossible to create a new tenure upon the grant of a fee; for a tenant in fee simple, though enabled freely to part with his land by substituting another tenant in his place, is by this statute restrained from granting his land or any part thereof to another for an estate in fee simple to be held of himself. After the statute, a freeholder in fee could no longer make himself a mesne lord. So that the tenures of fee simple estates, which were in existence just before the statute passed, became, as it were, stereotyped; and the fact, that no new tenure of an estate in fee simple could be any longer created by agreement, undoubtedly tended to simplify the law of tenure.

(t) Bract. fo. 85 a.

(u) The statute was not construed as giving to the king's tenants *in capite* liberty of alienation without his license; a liberty,

which they were afterwards allowed, subject to the payment of a fine; stat. 1 Edw. III. st. 2, c. 12; Co. Litt. 48.

We may be helped to a better understanding of the operation of the law of free tenure, if we glance at the different kinds of holding to which it was applied. For William the Conqueror's land settlement consisted rather in the confiscation of landlords' property than the disturbance of the cultivators of the soil; and his law of feudal tenure at first affected only the chief landowners' estates, leaving the old Saxon customs in force as to subordinate landowners. But afterwards the law of tenure spread downwards, and was applied to humbler forms of landholding than that usually enjoyed by the great men of the kingdom.

We gather from the Domesday survey, taken towards the end of the Conqueror's reign, that in each county large tracts of land belonged to the king or were held by his tenants *in capite*. The tenant *in capite* was sometimes an ecclesiastical corporation, such as Battle Abbey or St. Paul's Church, sometimes a great noble or other layman. Each tract of land of the king or his tenant *in capite* is described in detail in Domesday book; and is generally found to consist of several holdings which are often called *maneria*, manors, and *Maneria*. are sometimes spoken of as *villæ*, vills or towns. It is *Villæ*. generally stated, with regard to each of such holdings, that there are so many *villani* (*x*), or holders of land *Villani*. in villenage, so many *bordarii* or *cotarii*, that is, *Bordarii; cotarii; servi*. cottiers, and so many *servi* or bondmen. Sometimes the extent of the holding of the *villanus* is specified. And it is sometimes mentioned that so much land *Lord's demesne*. pertains to the demesne of the holder of the manor (*y*). Now it appears that the estate or holding which is in Domesday described as *manerium*, or *villa*, was a village together with a parcel of land, which was cultivated upon the common field system of husbandry by

(a) See Co. Litt. 5 b.

(y) See especially the survey of

Middlesex; Domesday, i. 127—130.

the *villani*, or villagers (*z*). Each *villanus* had a house and a certain quantity of arable land, which lay in scattered strips in the common fields of the vill, of which there were generally three. Besides arable land, the vill usually contained meadow land, also held in strips by the *villani*, but commonable according to the regulations of the community during certain seasons of the year (*a*). In the demesne of the holder of the *manerium* there was usually a mansion, or manor-house, for the occupation of himself or his bailiff, and a certain quantity of arable and meadow land, also in scattered strips. Sometimes the cottiers held a few strips of arable land besides their cottages. The barren lands which adjoined formed the wastes of the vill or manor, over which the cattle of the various tenants were allowed to roam in search of pasture (*b*). In early times after the Conquest, the *villanus* appears to have generally held his land by performing services, which were then regarded as servile; such as ploughing the lord's land, and doing other field labour for the lord. The amount of work and payments, which could be required from a *villanus*, as his services, were regulated by custom. As time went on, the labour-service was often commuted into a money payment (*c*). Tenure in villenage has been already briefly noticed (*d*), and will be further described in treating of copyhold tenure, to which it gave rise. It has been mentioned here in order to show the nature of the most important kind of freeholding at the time of the Domesday survey, namely, the *manerium* or agricultural estate; which may, perhaps, be said to have been the unit of free tenure; a large landed estate consisting in those days of

(*z*) Seebohm, *English Village Community*, ch. i.—iii.; see also Williams on Commons, 39—56, 66—70.

(*a*) See Williams on Commons, 79, 84, 90.

(*b*) See Vinogradoff, *Villainage in England*, Essay II., ch. ii.

(*c*) Seebohm, *English Village Community*, ch. ii., sects. 5—12, pp. 40—81.

(*d*) *Ante*, pp. 16, 17, 19.

a number of *maneria*, as at the present day it consists of a number of farms (e). There are, however, many cases in Domesday in which some person named in the survey holds a specified quantity of land as undertenant of the holder of a *manerium*; and such holdings appear to be also freeholdings (f). In very many instances the *manerium* described is not in the demesne of the king's tenant *in capite*, but is held of him by some named undertenant, so that the tenant *in capite* has but a mesne lordship in the land of which his tenant is seised in demesne. But it is not common in Domesday to find more than one mesne lord between the freeholder seised in his demesne and the king.

As we have seen (g), when the law of feudal tenure by military service was introduced into England, it was applied first to the estates of the king's tenants *in capite* and the *maneria*, which they contained. By grants and subinfeudation divers sub-manors and smaller estates were created, and new holdings were made by reclamation of waste lands (h). Thus arose the estates, *Manors*, which we now call manors, every one of which is of a date prior to the Statute of Quia Emptores (i), except, perhaps, some which may have been created by the king's tenants *in capite* with licence from the crown (k). But, besides the *maneria* of the great landowners and their undertenants by subinfeudation, there was another kind of *free holding*, which, at the time of the Domesday survey, was almost entirely confined to the north-

(e) A *manerium* was in fact in those days the quantity of land which was usually let to *firm*, *ad firmam*, that is, at a certain yearly sum, whenever such a method of getting the profits was adopted; see Domesday, i. 8; iii. (Baldon Book), 565; Domesday of St. Paul's, 122 *et seq.*

(f) And in most cases to have been held by knight service; see

Round, English Historical Review, vii. 12, 18, 19.

(g) *Ante*, pp. 12—14.

(h) See Hearne's *Liber Niger Scaccarii*, vol. i.; Hundred Rolls, temp. Edw. I.; Bracton, fo. 434; Fleta, lib. iv. c. 15, § 9.

(i) 18 Edw. I. c. 1.

(k) 1 Watk. Cop. 15; *ante*, p. 38, n. (u).

eastern counties (*l*), but by the time of Edward I. is ascertained to have extended to the Midland counties (*m*); and which seems to have steadily increased and spread. This was the holding of the *liber sochemannus* or *liber tenens*, the free man, who held his land by fixed agricultural services or money rent, and was subject to the jurisdiction of the lord's court (*n*). As this class of *liberi tenentes* increased, the *free holdings* which were not manors, but merely parcels of land held of a manor, increased in number and importance. In the course of time the freeholders became the most prominent class of tenants of a manor, and the *Court baron*, the lord's court, wherein the freeholders were both suitors and judges, was regarded as an inseparable incident of every manor (*o*). The tenure of the *liber sochemannus* became known as tenure in socage, of which we shall have more to say further on (*p*). In addition to agricultural estates and the holdings thereon, we find in Domesday a third species of *free holding*, namely, houses in cities or boroughs, held by the *burgenses*, or burgesses, generally at money rents. The law relating to this class of holding was determined by the custom of each particular borough (*q*). The tenure of houses in ancient boroughs was afterwards known as tenure in burgage (*r*); and the customs were often

Libér sochemannus.

Court baron.

Socage tenure.

Houses in boroughs.

Burgenses.

Tenure in burgage.

(*l*) Leicester, Lincoln, Norfolk, Northampton, Nottingham, and Suffolk; see the abstract of population given by Sir H. Ellis, Introduction to Domesday, vol. ii. pp. 419 *et seq.*; Seebohm, English Village Community, 86.

(*m*) See the Hundred Rolls, 7 Edw. I. (survey of Bedford, Bucks, Cambridge, Hunts, and Oxon).

(*n*) Nichols, History of Leicester, Introd. vol. i. p. xlvii.

(*o*) See Co. Litt. 58 a; Kitchen on Courts Leet, vi. 6—8, 105—115; 2 Black. Comm. 90; 3 Black. Comm. 33; Maitland, Sel-

den Society, vol. ii. lxi. *et seq.*; Vinogradoff, Villainage in England, 387—390.

(*p*) See Glanville, lib. vii. c. 3; Bracton, fo. 77 b; Britton, lib. iii. c. 2, §§ 7—12; Litt. ss. 117—119.

(*q*) See Domesday, vol. i. pp. 1 (Dover), 100 (Exeter), 154 (Oxford), 189 (Cambridge), 262 (Chester), 280 (Nottingham and Derby), 386 (Lincoln); vol. ii. p. 104 (Colchester); Stubbs, Select Charters, 87—91, 110—112.

(*r*) Glanville, lib. xii. c. 8. Bracton, fo. 273 a; Britton, lib. iii. c. 2, § 10; Litt. ss. 162—171.

highly advantageous to the holders. By the time of Edward I. there appears in records such a multiplication of mesne lordships, over burgage tenements as well as manors, and such an increase of freeholding tenants of manors, as clearly shows the large extent to which subinfeudation had prevailed (*s*).

SECTION II.

Of the Classification of Free Tenures.

After King Henry II. had appointed permanent judges of the King's Court (*t*), and a special remedy in that court had been provided for all persons wrongfully deprived of the possession of their land (*u*), the various kinds of holding above described were submitted to the test of a general judge-made law, and a classification of tenures was gradually accomplished. The first distinction made was between free tenure and tenure in villenage, which was regarded as base or servile tenure; the freeholder only being accorded and the tenant in villenage denied the remedy given in the King's Court for recovering possession of land unjustly seized (*x*). Free tenures again were either lay, or else spiritual or ecclesiastical (*y*). Lay tenures were mainly of two kinds: knight's service and socage. Of spiritual tenures we need only mention *frankalmoin* (*z*).

Classification
of tenures.

Classification
of free
tenures.

The incidents of tenure by knight's service, which

Incidents of
tenure by
knight's
service.

(*s*) See the survey of the counties of Bedford, Buckingham, Cambridge, Huntingdon and Oxford, made in the seventh year of Edw. I. Rot. Hund. ii. 321 *et seq.*

(*t*) *Ante*, p. 9, n. (*f*).

(*u*) *Viz.* the assise of novel disseisin; Glanville, xiii., 32 *et seq.*

(*x*) Bract. fo. 7, 26, 207 a, 208 b; *ante*, p. 17; see Vinogradoff, Villainage in England, 81—88.

(*y*) Glanville, xiii., 23, 25; Bract. fo. 207 a, 286; Co. Litt. 95 a.

(*z*) See Litt. s. 137.

Scutage or
escuage.

Aids.

Homage.

Fealty.

was the most honourable species of free tenure, were these:—First, the tenant was bound to discharge the obligation of military service annexed to his holding. The feudal obligation of military service was a royal service due to the king from his immediate military tenants (*a*); and the tenant by knight's service of a mesne lord would generally be bound to perform this royal service and to acquit his lord therefrom to an extent proportionate to the value of his holding (*b*). In and after the reign of Henry II. this feudal obligation of personal military service was generally commuted for a money payment called scutage or escuage (*c*), and assessed first by the Crown and afterwards by the authority of Parliament (*d*). But scutage and the feudal obligation of military service became obsolete after the reign of Richard II., if not earlier (*e*). The military tenant was, moreover, at first expected and afterwards obliged to render to his lord pecuniary aids, to ransom his person, if taken prisoner, to help him in the expense of making his son a knight, and in providing a portion for his eldest daughter on her marriage (*f*). On entering upon his estate, the tenant was bound to do homage to his lord, kneeling to him and professing to become his man; he was also bound to take an oath of fealty to him (*g*). An heir of full age

(*a*) See Stubbs, Const. Hist. §§ 98, 133, 162, 238; Madox, Hist. Exch. i. 620; Round, English Historical Review, vi. 433.

(*b*) Bract. fo. 36; Round, English Historical Review, vii. 11, 12, 15, 19.

(*c*) *Scutagium* (in French *escuage*) meaning originally *servitium scuti*, service of the shield. Dialogus de Scaccario I. ix.; Stubbs, Select Charters, 201, 2nd ed.; Litt. s. 95; Madox, Hist. Exch. i. 619.

(*d*) Stubbs, Const. Hist. § 161, 162; Madox, Hist. Exch. ch. xvi. It appears, however, that scutage was not first introduced

by Henry II.; mention of scutage is found in a charter of Henry I.; and the principle must have existed from the beginning of military tenure; Round, Eng. Hist. Review, vi. 629 *et seq.*

(*e*) 2 Stubbs, Const. Hist. § 275, p. 521, 2nd ed.; Co. Litt. 72 b.

(*f*) Glanv. ix. 8; Bract. fo. 36 b; Magna Carta Joh., art. 12, 14, 15; Stubbs, Select Charters, 298, 299, 2nd ed.; the amount to be taken as aids *pour faire fils chevalier et pour fille marier* were fixed by stats. 3 Edw. I. c. 86 & 25 Edw. III. st. 5, c. 11.

(*g*) Saving always his allegiance to the king; Glanville, ix. 1;

was required to pay a fine called a relief, on succeeding Relief. to his ancestor's estate (*h*). If the heir were under age the lord had, under the name of wardship, the Wardship custody of the body and lands of the heir, without account of the profits, till the age of twenty-one in males and sixteen in females (*i*). In addition to this, the lord possessed the right of marriage (*maritagium*), Marriage. or of disposing of his infant wards in matrimony (*k*). And if a male heir refused a suitable match, he was to forfeit a sum of money equal to the value of the marriage; that is, what the suitor was willing to pay down to the lord as the price of marrying his ward; and double the market value was to be forfeited if a male ward presumed to marry without his lord's consent (*l*). If a female heir refused the match tendered by her lord, he might hold her lands until she attained twenty-one, and further until he had taken the value of the marriage (*m*). The king's tenants *in capite* were, moreover, subject to many burdens and restraints, from which the tenants of other lords were exempt (*n*). Again, every lord who had two or more free tenants, had a right to compel them to do suit of court; that is, Suit of court duly to attain and to aid in transacting the business of the lord's court, or court baron (*o*), wherein his free Court baron. holders were judges as well as suitors (*p*). Lastly, on

Bracton, fo. 77 b—80; Litt. ss. 85—94; *ante*, p. 13, n.

(*h*) Glanv. ix. 4; Bract. fo. 84; Litt. s. 112.

(*i*) Glanv. vii. 9—12; Bract. fo. 86; Fleta, fo. 4; Litt. s. 103. A wardship, or the interest of a lord in the body and lands of his ward, was regarded as a chattel saleable and devisable by will, and was afterwards classed as a chattel real; Bract. fo. 87 a; Fleta, fo. 6; Britton, liv. 3, ch. 2, § 2; Y. B. 32 Edw. I. 186; Co. Litt. 85 a, 118 b.

(*k*) Glanv. vii. 12; Bract. 80 b—91 b; Fleta, fo. 9; Britton, liv. 3, ch. 2.

(*l*) Stats. 20 Hen. III. c. 6, 7;

3 Edw. I. c. 22; Litt. s. 110.

(*m*) Stat. 3 Edw. I. c. 22; Co. Litt. 79 a.

(*n*) As for an heir of full age to pay a whole year's profits on succeeding to his ancestor's estate for *primer seisin*; for an infant heir to *sue out his livery* on coming of age, that is, to pay half a year's profits for taking possession; involuntary knighthood in certain cases; and fines for alienation; see Co. Litt. 77 a, 87 a, n. (1); 2 Black. Comm. 66—72.

(*o*) *I. e. Curia Baronis*, the lord's court.

(*p*) For an account of the jurisdiction of the lord's court, see Maitland, Select Pleas from

Escheat.

failure of the tenant's heirs, his lord had the right to have the lands again as his escheat; that is, as falling in to the lord, who or whose predecessors had granted the fee (*q*) now brought to an end for want of heirs.

Attainder.

The tenant's heirs might fail either from natural causes or by reason of his or their attainder, or corruption of the blood so as to lose its inheritable quality. This was the legal consequence of judgment of death or outlawry (*r*) for treason or felony, and of abjuring the realm (*s*). Escheat upon attainder was, however, subject to the right of the Crown to hold for a year and a day, and to waste the attainted person's lands—a right usually compounded for (*t*). And the lands of one attainted for high treason were forfeited absolutely to the Crown, and did not escheat to the lord of the fee (*u*).

Grand serjeanty.

Tenure by grand serjeanty was reckoned equivalent to knight's service, being subject to the same burden of the lord's right of wardship and marriage. According to Bracton, to hold by grand serjeanty was to hold lands of the king or some other lord by rendering to the king, as royal service, some special service, other than knight's service or scutage, pertaining to the king or the defence of the realm and valued at five pounds or more (*x*). But in Littleton's day (*y*), grand serjeanty

Littleton.

Manorial Courts (Selden Society, Vol. II.), *Intro.* xxxviii. *et seq.*; Vinogradoff, *Villainage in England*, Essay II., ch. v.

(*q*) *Ante*, p. 37, 38.

(*r*) A criminal who flies from justice may by due process be *outlawed*, or put out of the protection of the law; Bract. fo. 124 *et seq.*; 4 Black. Comm. 319.

(*s*) Criminals, who took sanctuary, had the alternative of coming out to stand their trial, or of confessing their crime and abjuring and leaving the realm; Bract. fo. 135. Privilege of sanctuary was finally abolished by

stat. 21 Jac. I. c. 28, s. 7.

(*t*) Glanv. vii. 17; Bract. fo. 28, 129, 130; Britton, liv. 1, ch. 6, § 3; Co. Litt. 18 a, 92 b, 390 b, 391 a; 4 Black. Comm. 380; Bac. Abr. Forfeiture, Outlawry (D).

(*u*) Stat. 25 Edw. III, st. 5, c. 2; 8 Inst. 18.

(*x*) Bracton instances finding the king a man or several men armed, horse or foot, for his army; Bract. fo. 85 b—87 a, 87 b; Fleta, fo. 5; see Britton, liv. 3, ch. 2, § 6 and the note thereto in Mr. Nichols's edition.

(*y*) Littleton was a judge in the

was limited to cases where a man held lands of the king by such services as he ought to do in his own person to the king, as to carry the king's banner, or to be his marshall, or to carry his sword before him at his coronation, or to do other like services (*z*).

Free socage appears to have been originally the *Socage tenure*. name of the tenure of the *liberi sochemanni* (*a*), a class of landholders whose existence dates from before the Norman Conquest, but who were, as we have seen, rarely found at the time of the Domesday beyond the range of the north-eastern counties (*b*). The *sochemanni* appear to have been so-called because they were subject to their lord's soke (Anglo-Saxon, *soc*) that is, *Soc*. his right or liberty of jurisdiction (*c*): but as early as Bracton's time this derivation of the term was overlooked, and the origin of the word socage was referred to the French word *soc*, a ploughshare (*d*), sokemen being generally engaged in cultivating the land (*e*). *Liberi sochemanni* seem to have been free men holding their lands by yielding rent in money and rendering services, which were generally of an agricultural nature, but fixed in amount and far less onerous than the labour services of the *villani* (*f*). In course of time

reign of Edward IV. and wrote a treatise on Tenures, which is a book of authority.

(*z*) Litt. s. 158.

(*a*) So called chiefly to distinguish them from the *villani sochemanni* on the ancient demesne of the Crown; see *post*, p. 57 n. (*b*); Vinogradoff, *Villainage in England*, 196 *et seq.*

(*b*) *Ante*, p. 42. There are several instances in Domesday of land having been held in King Edward's time by *sochemanni*, which was not so held at the time of the survey, especially in Bedfordshire; see Domesday, i. 11 a, 13 b, 14 b, 132 b, 134, 140 b, 141, 190, 191, 209—218.

(*c*) Somner on Gavelkind, 180

et seq., 2nd ed.; 2 Black. Comm. 80. As to the meaning of *soc*, see Maitland, *Select Pleas in Manorial Courts*, Selden Society, Vol. II. xxii.

(*d*) Du Cange, *Gloss. subverb.* Socagium, Soccus, 2; Litt. s. 119.

(*e*) Bract. 77 b.

(*f*) Thus a sokeman might have to plough for his lord three times a year and do a few days' extra work at harvest time, where a villan would have to work three days a week for his lord. See Domesday i. 179 a (services of householder in Hereford); *Liber Niger Petroburgensis* (circa A. D. 1125) published as an appendix to the *Chronicon Petroburgense* (Camden So-

these services were generally commuted for money payments (*g*). And the class of freeholders, who held parcels of land from the lord of a manor at rent in money or fixed agricultural services, appears to have steadily spread and increased (*h*). So that by the time of Edward I., the free tenants of a manor, holding their land in socage, often at a money rent, had become prominent members of the agricultural community (*i*); whilst the *villani* of that period, of whose tenure the servile conditions are often especially noted in records, occupied an inferior position (*k*). Besides the services incident to tenure in free socage, the tenant was bound to take an oath of fealty to his lord; sometimes, indeed, he owed no other service than fealty (*l*), but homage, the invariable incident of military tenure, was rarely required of him (*m*). The statutory aids *pour fille marier* and *pour faire fils chevalier* were incumbent on tenants in socage as well as by knight's service (*n*). In all cases of annual rent, the relief paid on succession by the heir of tenant in socage was fixed at one year's rent (*o*). Suit of court and escheat were incident to socage as to military tenure (*o*). The main difference between the two forms of tenure was in the matters of wardship and marriage, which, in the case of an infant heir of a tenant in socage, devolved, not upon his lord, but on his nearest relation to whom the

Incidents of socage.

Fealty.

Aids.

Relief.

Wardship and marriage in socage.

ciety), pp. 157—166, 172, 173, where compare the services of the *sochemanni* with those of the *villani*; Glanville, vii. 1, 3, 9, 11; Bract. fo. 35 b, 77 b, 85 b, 207 a, 209 a; Britton, liv. 8, ch. 2, §§ 5, 7; Rot. Hund. ii. 470, 475, 484, 501, 591, 608, 656, 677, 752, 846, 871; Vinogradoff, Villainage in England, 196 *et seq.*, 308 *et seq.*

(*g*) Litt. s. 119.

(*h*) See Nasse, Agricultural Community of the Middle Ages (English translation), 32—36; Seebohm, English Village Community, 86 and note.

(*i*) As to the freeholding tenants of the manor of the thirteenth century, see Vinogradoff, Villainage in England, Essay I. ch. iii. Essay II. ch. iv., also pp. 808—312, 387 *et seq.*, 406—408, 452.

(*l*) See Nasse, 34—40; Rot. Hund. ii. 821, 834, 838, 823.

(*l*) Bract. fo. 84 b; Litt. ss. 117, 118, 130, 131.

(*m*) Bract. fo. 77 b. 84 a; see Vinogradoff, Villainage in England, 454.

(*n*) *Anta*, p. 44, n. (*f*).

(*o*) Glanville, ix. 4; Bract. fo. 55 b, 86 a; Litt. ss. 126—128.

inheritance could not descend, and who was strictly accountable for the profits (*p*).

As time went on, the term socage was applied as a general name for all tenures, where the tenant held of his lord by certain service for all manner of services, so that the service were not knight's service (*q*). Socage tenure thus came to comprise several forms of tenure in which the services were not originally of the nature of sokeman-service, but which were distinguished by certainty of service and freedom from the lord's right of wardship and marriage; as in the case of those, whose tenure had by agreement with their lords been changed out of knight's service to certain rent (*r*), or of those, who held by petty serjeanty (*s*). Originally, to hold by petty serjeanty seems to have been to hold lands, whether of the king or of some other lord, either by some royal service of small value, as finding the king a man and horse with bag and buckle for any necessity touching his army, or else by some petty service to be rendered to the tenant's immediate lord, as riding with him, holding his court, carrying his writs within certain bounds, feeding his hounds, or finding him bows and arrows (*t*). But in Littleton's time, tenure by petty serjeanty seems only to have survived in cases where a man held lands of the king by yielding him yearly a bow, or a sword, or a pair of gilt spurs, or other such small things belonging to war (*u*). So too, tenure in burgage (*x*) was said to be but tenure in socage (*y*). Thus tenure in socage, though

(*p*) Glanville, vii. 11; Bract. fo. 87 b, 91 a, Fleta, fo. 5; Britton, liv. 3, ch. 2, § 5; Litt. ss. 123—125.

(*q*) Bract. fo. 87 a; Fleta, fo. 199; Litt. ss. 117, 119; Vinogradoff, Villainage in England, 196.

(*r*) See Bract. fo. 86 a, 87 b; Britton, liv. 3, ch. 2, §§ 5 8.

(*s*) Fleta, fo. 204.

(*t*) Bract. fo. 85 b, 87 b; Fleta, fo. 5; see Britton, liv. 3, ch. 2, § 6, and note thereto, ed. Nichols; Vinogradoff, Villainage in England, Essay II. ch. iv.

(*u*) Litt. ss. 159, 161; Co. Litt. 108 a.

(*x*) *Ante*, p. 42.

(*y*) Litt. s. 162.

of humbler origin than the military tenures, came to be regarded as a far more beneficial form of landowning.

Tenure in
frankalmoign.

Mortmain.

Tenure in frankalmoign arose before the statutes of Edward I. prohibiting the alienation of land into mortmain (*a*), when a man gave land to an abbot or prior and his convent, or to a dean and chapter, or other ecclesiastical corporation to be held by them and their successors in pure and perpetual alms or in *frankalmoign* (*b*). And they who held in frankalmoign were bound of right (*c*) before God to make prayers and other Divine services for the souls of their grantor and his heirs. And they did neither homage, nor fealty nor any other service to their lord; because their Divine service was reckoned better for the lord than any doing of fealty; and because the words in *frankalmoign* excluded the lord from having any earthly or temporal service done for him (*d*). As a corporation never dies, no relief could become payable, and there was no chance of escheat (*e*).

SECTION III.

Of Free Tenure in Modern Times.

As time went on, many of the incidents, both of military and other tenures, ceased to have any practical

(*a*) Stats. 7 Edw. I. c. 1; 18 Edw. I. c. 1; from which it appears that lands given to an ecclesiastical or other corporation were said to come into the *dead hand*, because they then became unprofitable, both to the king, because the exaction of the royal services due to him therefrom was prejudiced, and also to the immediate lords, who lost all prospect of reliefs, wardships, marriages or escheats out of them.

(*b*) As to *frankalmoign* in the

twelfth and thirteenth centuries, see Maitland, Law Quarterly Review, vii. 354.

(*c*) *I. e.* by ecclesiastical law, which provided a remedy for the lord if the tenants neglected their divine services; Litt. s. 136; Co. Litt. 95 b. 96 a.

(*d*) Glanville, vii. 1; ix. 2; Bract. fo. 13 a. 27 b. 78 b; Litt. ss. 138—142; Co. Litt. 67 b.

(*e*) Co. Litt. 94 b. 95 a. 99 a. 250 a.

importance. Scutage became obsolete, as we have seen (*f*); and the military service, which it had superseded, became a mere tradition (*g*). Homage and fealty were neglected (*h*), and the fixed money rents so often payable in respect of fees held in socage gradually fell into insignificance with the diminishing value of money. But the lord's rights of wardship and marriage in the case of tenure by knight's service and the peculiar exactions, to which the heirs of the king's tenants *in capite* were liable (*i*), continued to be actively enforced. Through Tudor legislation, the burthen of these liabilities was rendered more galling (*k*); and at the end of the sixteenth century they were felt to be an intolerable hardship (*l*). A resolution of the Long Parliament passed on the 24th of February, 1645, at length gave relief (*m*), which was too precious to be afterwards relinquished. Accordingly, at the restoration of King Charles II. an act of Parliament was insisted on and obtained, providing that as from the 24th of February, 1645, all tenures by knight's service, and the fruits and consequences of tenures *in capite* (*n*) should be taken away, and all tenures of estates of inheritance in the hands of private persons (except tenures in frankmoign and copyhold tenures) turned into free and common socage; and that the same should be for ever discharged from homage, wardships, values and forfeitures of marriage, and other charges incident to tenure by knight's service, and from aids for marry-

(*f*) *Ante*, p. 51.

(*g*) See Litt. ss. 95—97, 100.

(*h*) Co. Litt. 68 a.

(*i*) *Ante*, p. 45, n. (*n*).

(*k*) Stats. 4 Hen. VII. c. 17; 28 Hen. VIII. c. 10, deprived tenants of the opportunity, which they had previously enjoyed, of preventing the incidence of the lord's right of wardship by keeping their lands in the hands of a

number of trustees for their own use. By stat. 32 Hen. VIII. c. 48, a Court of Wards and Liveries was erected, the proceedings of which caused much discontent.

(*l*) See Sir Thomas Smith, *De Republica Anglorum*, lib. 3, c. 5, ed. 1533; 4 Inst. 202.

(*m*) Digby, *History of the Law of Real Property*, ch. ix.

(*n*) Co. Litt. 103 a, n. (5).

ing the lord's daughter and for making his son a knight (*o*).

Present free
tenures.

Modern
incidents of
socage tenure.

Rent.

Relief.

Suit of Court.

Fealty.

Escheat.

Since the year 1645, therefore, the only free tenures existing have been the lay tenure of free and common and the spiritual tenure of frankalmoign. In modern times the incidents, which mark the relation of lord and tenant of an estate in fee simple held in socage, are of rare occurrence. Thus a *rent* is not now often paid in respect of the tenure of an estate in fee simple. When it is paid, it is usually called *quit rent* (*p*), and is almost always of a very trifling amount; the change in the value of money in modern times will account for this. The *relief* of one year's quit rent, payable by the heir on the death of his ancestor, in the case of a fixed quit rent, was not abolished by the statute of Charles, and such relief is accordingly still due (*q*). Suit of Court also is still obligatory on tenants of estates in fee simple, held of any manor now existing (*r*). And the oath of fealty still continues an incident of tenure; but in practice it is never exacted (*s*). There is, however, one incident of tenure still remaining, which is occasionally productive of substantial advantage to the lord. The lands of a tenant in fee simple remain liable to escheat (*t*) to the lord of the fee on failure of the tenant's heirs. At the present day failure of heirs can only occur from natural causes, for an Act of the year 1870 abolished all attainder, forfeiture or escheat upon judgment for treason or felony (*u*). When, therefore,

(*o*) Stat. 12 Car. II. c. 24. The 12th Car. II. A. D. 1660, was the first year of his actual reign.

(*p*) Which properly means a commutation rent, or rent where by the tenant is quit of services; 2 Black. Comm. 43; Co. Litt. 85 a, n. (1); *Purcell*, app., *Pitt*, resp. (1855), 17 C. B. 299; Williams on Seisin, 28. Such a rent may now be redeemed by the

tenant under stat. 44 & 55 Vict. c. 41, s. 45; see Williams's Conveyancing Statutes, 217, 218.

(*q*) Co. Litt. 85 a, n. (1); Scriv. Cop. 738.

(*r*) Scriv. Cop. 738.

(*s*) Co. Litt. 67 b, n. (2), 68 b, n. (5).

(*t*) *Ante*, p. 46.

(*u*) Stat. 33 & 34 Vict. c. 23, s. 1 (passed 4th July, 1870). It had

a tenant in fee simple dies, without having alienated his lands in his lifetime or by his will (either of which will prevent escheat) (x), and without leaving any blood relation to succeed him as his heir, such lands will fall in to the lord of whom they were held. Bastardy is the most usual cause of the failure of heirs; for a bastard is in law *nullius filius*; and, being nobody's son, he can consequently have no brother or sister, or any other heir than an heir of his body (y). If such a person, therefore, were to purchase lands, that is, to acquire an estate in fee simple in them, and were to die possessed of them without having made a will and without leaving any issue, the lands would escheat to the lord of the fee, for want of heirs. When an escheat occurs, the Crown most frequently obtains the lands escheated, in consequence of the before-mentioned rule, that the crown is the lord paramount of all the lands in the kingdom (z). But if there should be any lord of a

Bastardy.

been previously provided that no attainder for felony, except in the case of high treason or murder, or abetting, procuring or counselling the same, should extend to the disinheriting of any heir or the prejudice of the right of any person other than the right of the offender during life; stats. 54 Geo. III. c. 14; 9 Geo. IV. c. 31, s. 2; 24 & 25 Vict. c. 100, s. 8.

(x) Year Book, Pasch. 49 Edw. III. 16, pl. 10; Co. Litt. 236 a, n. (1); Scriv. Cop. 762. But it may perhaps be doubted whether the present Wills Act (7 Will. IV. & 1 Vict. c. 26, s. 3) extends to this case, and whether, therefore, in order to prevent an escheat, three witnesses should not attest the will as under the old law, which still subsists as to wills to which the present Act does not extend (see sect. 2).

(y) Co. Litt. 3 b; 2 Black. Comm. 247; Bac. Abr. tit. Bastardy (B).

(z) It must not be supposed that the Queen personally derives any

benefit from an escheat. The Crown rights over land have long been subject to parliamentary control and the revenues and profits arising therefrom applied to national purposes. The Crown lands are now managed by the Commissioners of Woods, Forests and Land Revenues, and the revenues thereof are during the Queen's life to be carried to the Consolidated Fund, which is applicable in generally defraying the national expenditure, and out of which the annual sum granted by Parliament for the Civil List (including Her Majesty's privy purse and the maintenance of her household) is paid. See 1 Black. Comm. 286, 331—335; stats. 58 Geo. III. c. 93; 10 Geo. IV. c. 50; 1 & 2 Vict. c. 2, ss. 2, 8. Procedure in cases of escheat is now regulated by stat. 50 & 51 Vict. c. 53 and the rules thereunder; see W. N. 27th July, 1889. Lands escheated or forfeited to the Crown have been frequently restored to the families of the persons to whom such lands

manor, or other person, who could prove that the estate so terminated was held of him, he, and not the Crown, would be entitled (a). In former times there were many such mesne or intermediate lords, as we have seen (b). But now the fruits and incidents of tenure of estate in fee simple are so few and rare, that many such estates are considered as held directly of the Crown, for want of proof as to who is the intermediate lord; and the difficulty of proof is increased by the fact before mentioned, that, since the statute of *Quia Emptores*, passed in the reign of Edward I. (c), it has not been lawful to create a tenure of an estate in fee simple; so that every lordship or seignory of an estate in fee simple bears date at least as far back as that reign: to this rule the few seignories which may have been subsequently created by the king's tenants *in capite* form the only exception (d).

A small occasional *quit rent*, with its accompanying *relief*,—*suit* of the Court Baron, if any such exists,—an oath of *fidelity* never exacted,—and a right of *escheat* seldom accruing,—are now, it appears, therefore, the ordinary incidents of modern socage tenure. There are, however, a few varieties in this tenure which are worth mentioning. They arise in respect either of the terms on which the lands holden were originally granted, or the places where they are situate. As to the former case, lands may still be holden by grand or petit serjeanty (e); for while by the Act of Charles II. grand serjeanty was, with the other military tenures,

belonged pursuant to stat. 39 & 40 Geo. III. c. 88, s. 12, explained and amended by stats. 47 Geo. III. sess. 2, c. 24; 59 Geo. III. c. 94, and 47 & 48 Vict. c. 71, and extended to forfeited leaseholds by stat. 6 Geo. IV. c. 17.

(a) *Doe d. Hayne and His Majesty v. Redfern* (1810), 12 East, 96.

(b) *Ante*, pp. 37, 43.

(c) 18 Edw. I. c. 1; *ante*, p. 38.

(d) By stat. 13 & 14 Vict. c. 60, lands vested in any person upon any trust, or by way of mortgage, are exempted from escheat. This Act repeals a former statute, 4 & 5 Will. IV. c. 23, to the same effect.

(e) *Ante*, pp. 46, 49.

turned into socage and deprived of its burdensome incidents, its honorary services were expressly retained (*f*). And petit serjeanty, being but socage in effect, was not abolished by the statute (*g*). With regard to such varieties of tenure as relate to places, these are principally the tenures of gavelkind, borough-English, and ancient demesne.

The tenure of gavelkind, or as it has been more correctly styled (*h*), socage tenure, subject to the custom of gavelkind, prevails chiefly in the county of Kent; where all lands anciently and originally holden in socage are of the nature of gavelkind (*i*), and all estates of inheritance in land (*k*) are presumed to be holden by this tenure until the contrary is shown (*l*). The most remarkable feature of this kind of tenure is that upon the death of a tenant in fee intestate, the descent of his estate is not governed by the common law rule, which, as we shall see (*m*), gives the land to the eldest son or other male relation to the exclusion of all other males in the same degree of kindred: but his land goes to all his sons in equal shares (*n*), and so to brothers and other collateral relations, on failure of nearer heirs (*o*). It is also a remarkable peculiarity of this custom that, although by the common law no one under the age of twenty-one years can make a binding disposition of his land (*p*), a tenant in fee of gavelkind lands is able, at the early age of fifteen years, to dispose

(*f*) Stat. 12 Car. II. c. 24, s. 7; Co. Litt. 108 a, n. (1).

(*g*) Litt. s. 160; Co. Litt. 103 b, n. (1).

(*h*) Third Report of Real Property Commissioners, p. 7.

(*i*) Robinson on Gavelkind, 45 (55, 3rd ed.).

(*k*) Including estates tail, Litt. s. 265; Robinson on Gavelkind, 52, 94 (64, 119, 3rd ed.).

(*l*) Robinson on Gavelkind, 44

(54, 3rd ed.).

(*m*) *Post*, ch. ix.

(*n*) Litt. s. 210, 265.

(*o*) Rob. Gav. 92 (115, 3rd ed.);

3rd Rep. of Real Property Commissioners, p. 9; *Crump* d.

Woolley v. Norwood, 7 Taunt. 362; *Hook v. Hook*, 1 H. &

M. 43; in opposition to *Bac. Abr. Descent* (D), citing Co. Litt. 140 a.

(*p*) *Post*, ch. xii.

of his estate by feoffinent (*q*), the ancient mode of conveyance already alluded to (*r*). There was also no escheat of gavelkind lands upon judgment of death (*s*) for felony (*t*); and some other peculiarities of less importance belong to this tenure (*u*). The custom of gavelkind is undoubtedly of great antiquity (*x*), and its existence seems to be owing to the preservation in Kent of the old English law with regard to sokemen's land (*y*). It is still held in high esteem by the inhabitants, so that whilst some lands in the county, having been originally held by knights' service, are not within the custom (*z*), and others have been disgavelled, or freed from the custom, by various Acts of Parliament (*a*), any attempt entirely to extinguish the peculiarities of this tenure has uniformly been resisted (*b*). There are a few places, in other parts of the kingdom, where the course of descent follows the custom of gavelkind (*c*); but it may be doubted whether the tenure of gavelkind, with all its accompanying pecu-

(*q*) Rob. Gav. 193, 194, 217, 218 (243, 249, 276, 279, 3rd ed.); 2 Black. Comm. 84; Sandys, *Consuetudines Kancie*, 165 *et seq.*; see stat. 8 & 9 Vict. c. 106, s. 3.

(*r*) *Ante*, p. 30.

(*s*) Otherwise in case of outlawry for felony or abjuration of the realm; see *ante*, p. 46.

(*t*) Rob. Gav. 226 (288 *et seq.*, 3rd ed.). The custom did not extend to give exemption from forfeiture on high treason.

(*u*) The husband is tenant by the curtesy of a moiety only of his deceased wife's land, until he marries again, whether there were issue born alive or not; the widow also is dowerable of a moiety instead of a third and during widowhood and chastity only; estates in fee simple were devisable by will, before the statute was passed empowering the devise of such estates; and some other ancient privileges,

now obsolete, were attached to this tenure. See Robinson on Gavelkind, *passim*; 3rd Report of Real Property Commissioners, p. 9.

(*x*) See Bracton's Note-book, cases 9, 666, 1644, 1769; *Consuetudines Kancie*, 1 Statutes of the Realm, 223.

(*y*) Somner on Gavelkind, 61 *et seq.* 2nd ed.; Rob. Gav. 20—31 (24—38, 3rd ed.); Elton, *Tenures of Kent*, 50—53; Vinogradoff, *Villainage in England*, 205 *et seq.*, 247.

(*z*) Rob. Gav. 46 (57, 3rd ed.).

(*a*) See Rob. Gav. 75 (94, 3rd ed.).

(*b*) An express saving of the custom of gavelkind is inserted in the Act for the commutation of certain manorial rights, &c. Stat. 4 & 5 Vict. c. 35, s. 80.

(*c*) Kitchen on Courts, 200; Co. Litt. 140 a.

liarities, is to be found elsewhere than in the county of Kent (*d*).

Tenure subject to the custom of borough-English owes its origin to the old law of tenure in burghage (*e*). It prevails in several cities and ancient boroughs, and districts adjoining to them; the tenure is socage, but, according to the custom, the estate descends to the *youngest son* in exclusion of all the other children (*f*). The custom does not in general extend to collateral relations; but by special custom it may, so as to admit the youngest *brother*, instead of the eldest (*g*).

The tenure of ancient demesne exists in those manors, and in those only, which were in the demesne (*h*) of the Crown in the reigns of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated *Terræ Regis Edwardi*, or *Terræ Regis* (*i*). The socage tenants of these manors possessed certain immunities, the chief of which was that all actions concerning the title to their land must be brought in their lord's court (*k*). Before the year 1833, certain judicial proceedings in the form of real actions (*l*) were

(*d*) See Bac. Abr. tit. Gavelkind (B) 8.

(*e*) *Ante*, p. 42; see Vinogradoff, Villainage in England, 185.

(*f*) Litt. s. 165; 2 Black. Comm. 83. Estates tail, as well as in fee simple, descend according to this custom; Rob. Gav. 94 (190, 3rd ed.).

(*g*) Comyns' Digest, tit. Borough-English; Watk. Descents, 89 (94, 4th ed.). See *Rider v. Wood*, 1 K. & J. 644.

(*h*) That is, manors, of which the lordship had not been granted out by the Crown; and in which the tenants held directly of the Crown as lord of the manor.

(*i*) 2 Scriv. Cop. 687.

(*k*) These socage tenants holding in ancient demesne appear to have been the successors of the

villani sochemanni, a privileged class of tenants in villinage on the ancient demesne of the Crown, whose possession was protected, not in the King's Court, but by a special writ issued by the king and directed to his bailiff of the manor. See Bracton, fo. 7, 26, 200, 328 b; Fleta, fo. 4; Britton, liv. 3, ch. 2, § 11; F. N. B. 11 F. M., 12 B, 13 D, 14; 4 Inst. 269; Com. Dig. Ancient Demesne; 2 Black. Comm. 99; 3rd Report of Real Property Commissioners, p. 12; Vinogradoff, Villainage in England, Essay I. ch. iii.

(*l*) These were *fines*, necessary to convey the estates of married women, and *recoveries* used to bar estates tail; see *post*, ch. iii. and xiii.

necessary to effect the conveyance of land in particular cases; and these proceedings could only take place, as to lands in ancient demesne, in the lord's court. As the nature of the tenure was not always known, much inconvenience frequently arose from the proceedings being taken in the usual Court of Common Pleas at Westminster, and these mistakes gave to the tenure a prominence in practice which it would not otherwise have possessed. In consequence of the substitution in the year 1833 of a simple deed for the judicial proceedings referred to, such mistakes have since been impossible (*m*). And owing to changes of procedure made in the year 1852 (*n*), actions for the recovery of land held in ancient demesne may now be brought in the ordinary courts of law without the possibility, which previously existed (*o*), of the defendants objecting to the tribunal (*p*). So that this kind of socage tenure now possesses but little practical importance.

Frankalmoign.

So much then for the lay tenure of free and common socage, with its incidents and varieties. As we have seen (*q*), the spiritual tenure of frankalmoign was expressly excepted from the statute 12 Car. II. c. 24, by which the other ancient tenures were destroyed. It is still subsisting, distinguished in modern as in ancient times by its immunity from temporal services, even from the obligation to do fealty (*r*), and is the tenure by which the lands of the church are for the most part held (*s*).

Inclosure of common lands.

In connection with the progress from ancient to

(*m*) By stat. 3 & 4 Will. IV. c. 74, the Act for the Abolition of Fines and Recoveries; by ss. 4—6, the mistakes above alluded to were corrected as far as possible.

(*n*) By stat. 15 & 16 Vict. c. 76, ss. 168 *et seq.*

(*o*) Adams on Ejectment, 229,

4th ed.

(*p*) See Cole on Ejectment, 182, 183.

(*q*) *Ante*, p. 51.

(*r*) See *ante*, p. 50.

(*s*) 3rd Report of Real Property Commissioners, p. 7.

modern tenure and ownership, we may here notice, besides the diminution of the lord's interest, another change, which has also greatly helped to bring about the approximation to absolute ownership of the right of a freeholder in fee. That is, the abolition of the common field system of cultivation. This was generally effected all over England by private Acts of Parliament, passed chiefly between 1760 and 1845 (*t*), for the inclosure of the common fields of particular manors and villages. By these Acts the common lands were set out or redistributed so as to allot to the various landowners separate holdings, lying more or less together, in place of and proportionate in size to their former scattered strips (*u*). The consequence of this was an enormous gain in the direction of free enjoyment (*x*). Strips of land in a common field were subject to the customary mode of cultivation prevailing in the village community, and to the common rights of pasture, when lying fallow (*y*). But the inclosure of common lands gave to each landowner a holding, which he might cultivate as he would, and which was discharged from his neighbours' rights of common.

(*t*) Seebohm, *English Village Community*, 14, 15.

(*u*) See Williams on Commons, 77—79, 248 *et seq.*; Seebohm, *Eng. Vill. Comm.* 13, 14; Scrutton, *Commons and Common Fields*, ch. vi. vii.

(*x*) *Ante*, p. 2.

(*y*) Seebohm, *English Village Community*, 11, 12, 450; Vinogradoff, *Villainage in England*, 280, 259 *et seq.*, 398—400; see *ante*, p. 39.

CHAPTER II.

OF AN ESTATE IN FEE SIMPLE.

[In the preceding chapter we examined the tenure of a freehold in fee, and found that in modern times the incidents, which mark the relation of lord and free tenant of a fee, rarely occur in practice, and are an insignificant burden on the tenant and of small profit to the lord. For the latter now has no possibility of deriving any substantial benefit from his position except in the case of escheat, and this can only happen when the tenant dies intestate and without heirs. We will now consider the incidents of freehold estates generally, and the tenant's rights and liabilities in respect of his land as regards all other persons besides his lord. And first, estates (a) in land are either freehold or less than freehold. Freehold estates are either estates of inheritance, which are in fee simple (inheritable by heirs generally) or in fee tail (inheritable only by heirs of the donor's body), or else estates not of inheritance, but for some definite period of uncertain duration, as where land is given to one to hold for his life, or the life of another, or until some particular event shall happen. Estates less than freehold arise where one gives land to another to hold for a certain period or *term*, or at the donor's will only, or where one occupies another's land on sufferance (b). That a tenant who may be ejected at will should not have a freehold is hardly surprising, but the reader may wonder why the modern leaseholder,

Estates of
freehold or
less than
freehold.

(a) See *ante*, p. 7.

(b) Bract. fo. 26 b, 27 a, 207 a;

Litt. s. 57; Co. Litt. 48 b; 2
Black. Comm. ch. vii.—ix.

whose possession is in every way secure, and who frequently holds for a term exceeding the ordinary duration of human life, should not have an estate of freehold. The reason is that the old law would never recognize the possession of termors as the possession of a freeholding, or ever allow them to use the freeholder's remedies for dispossession. And though leasehold interests in land afterwards came to be an important species of property in land, yet they were protected by special remedies, and so came to be classed apart from freeholds (c).

Let us here notice that the essential quality of Freeholders ownership belongs equally to all freehold estates. For every freeholder, whether in fee simple, fee tail, for life or otherwise, has the right to maintain or recover possession of his land as against all the world (d). While he remains in possession he may exclude all others from his land (e); and if he be wrongfully ejected, he may recover possession of his land by peaceable (f) entry or by action (g). And these rights have been secured to freeholders from the earliest days of our common law (h).

(c) See *ante*, p. 17.

(d) *Ante*, pp. 2, 16.

(e) 8 Black. Comm. ch. xii.; Bac. Abr. Trespass (C. F.)

(f) Forcible entry is prohibited by stats. 5 Ric. II. st. 1, c. 7 (c. 8 in Ruffhead); 15 Ric. II. c. 2.

(g) The real and mixed actions given by the common law to freeholders were abolished in 1833. But for more than two centuries previously it had been usual to try the title to freehold land in the action of ejectment. This was properly the leaseholder's remedy for dispossession: but it was extended to freeholds by means of the fiction of a lease, which the defendant was by rule of Court prevented from disputing. In 1852 the old proceedings in eject-

ment, including the fiction of a lease, were abolished, and a ejectment.

simpler form of action was substituted, enabling any person, whether freeholder, copyholder, or leaseholder, to recover directly the possession of land, if entitled thereto. Since the Judicature Acts began in 1875, this action has been termed an action for the recovery of land. See *ante*, pp. 16, 17, 23; 3 Black. Comm. 200-206; stats. 3 & 4 Will. IV. c. 27, s. 36; 15 & 16 Vict. c. 76, ss. 168-221; Rules of the Supreme Court, 1883, Orders II. (r. 3), III. (r. 6), XII. (rr. 25-29), XVIII. (r. 2), XXI. (r. 21), XLII. (r. 5), XLVII., and Appx. A. pt. III., s. 4, C. s. 7, H. No. 8.

(h) See *ante*, pp. 16, 17.

Estate in fee simple.

[Of freehold estates, let us take first an estate in fee simple; that is, an estate given to a man and his heirs simply and without restriction (z), and inheritable therefore by his blood-relations, collateral as well as lineal, according to the legal rules of the descent of a fee (j). Such an estate is, as we have seen (k), the most absolute property which a subject can have in land. It possesses, indeed, all the incidents of absolute ownership, except the form (l). For tenant in fee simple may freely dispose of his land in his lifetime or by his will, and that either for his whole estate or for any part thereof, as for a term of years. His land may be taken to satisfy his debts either in his lifetime or after his death. And he has the right of *free* enjoyment (m) to the fullest extent to which it is consistent with the security of his neighbours' persons and property. It must not be supposed, however, that all these advantages have always been attached to the possession of fee. On the contrary, they were won step by step, and at widely different periods. It is a constant disadvantage to any one attempting to expound real property law, that so many matters, apparently simple, cannot be rightly explained without referring to the history of law and to times long gone by. But for this very reason, real property law affords a peculiarly instructive exercise for the student. From no other branch of the law is he likely to gain such a thorough conviction of the futility of attempting to reason about law upon instinct, without knowing how the law became what it is.

Fee simple tenant's right of alienation in his lifetime.

Let us examine first the fee-simple tenant's right of alienation in his lifetime. It appears from Domesday that before the Norman Conquest there were certainly

(i) Bract. fo. 17 a; Litt. s. 1.

(j) These are given in ch. ix., post.

(k) *Ante*, p. 6.

(l) See *ante*, pp. 2, 3.

(m) *Ante*, p. 2.

some free landowners who could dispose of their land as they would (*n*). But the system of feudal tenure, which came to be the general condition of holding land freely after the Conquest, was essentially restrictive of alienation. For the grant of a fee to a man and his heirs was not originally construed as conferring upon the grantee the whole property in the land bestowed. On the contrary, he was regarded rather as taking only a right to enjoy the land himself so long as he lived; while his heir, who was by the grantor's bounty appointed to succeed to a similar right, was considered as acquiring thereby a substantial interest in the land (*o*). The lord himself, too, retained valuable rights over the land; for the services reserved on the grant of a fee were a charge upon the land, and if they fell into arrear, he had the remedy of distress by seizing the tenant's chattels, which were upon the land (*p*). The lord also had, as we have seen (*q*), the right to repossess the land, as his escheat, on failure of the tenant's heirs. In subinfeudation, or the grant of a fee to be held of himself (*r*), the tenant found means of disposing of his land without actually breaking the feudal tie between his lord and himself; but it seems that at first he could not, even by subinfeudation, give his grantee a valid title to the land without the confirmation both of his heir and of his lord (*s*). But as a general English law

(*n*) Those, of whom it is recorded that they could give or sell their lands without their lord's licence, or as they would, or could go where they would with their land; see, for example, Domesday 30 b. 31, 34, 127, 130, 210. It is worthy of note that in places, where the old English customs were best preserved, we find customs alleged for freemen to sell their lands as they will; see customs of Newcastle-on-Tyne, Stubbs, *Select Charters*, 112, 2nd ed.; *Consuetudines Kancie*, 1 Statutes of the Realm, 223.

(*o*) Butler's note (vi. 5) to Co. Litt. 191 a; Hallam, *Middle Ages*, i. 159—183; Palgrave, *English Commonwealth*, vol. i. pp. 509 *et seq.*; vol. ii. pp. cxcxi, *et seq.*; Glanv. vii. 1; Stubbs, *Const. Hist.* §§ 93—96.

(*p*) Glanv. ix. 8; Bract. fo. 156 a, 217; Britton, liv. 1, ch. 23, §§ 13—15; liv. 3, ch. 4, §§ 16, 23.

(*q*) *Ante*, p. 46.

(*r*) *Ante*, p. 37.

(*s*) This may be inferred from the existence of numerous early charters of confirmation both by heir and lord. The heir, however,

of tenures grew up under the influence of regular decisions of the king's court, these restrictions on alienation were gradually relaxed.

Progress of
right of
alienation as
against heir.

Inroad was first made upon the interest of the heir. For we learn from Glanville (*t*) that in Henry the Second's reign any freeholder might give away *part* of his land at will, either with his daughter in marriage, or in remuneration of service, or to a religious place in alms (*u*); and his heirs were bound to warrant (*v*) gifts so reasonably made (*x*). At the same time a larger right of alienation was enjoyed over lands which a man had acquired by purchase than over those, of which he had become possessed by inheritance; but even in the case of purchased lands a tenant in fee could not by alienation entirely disinherit an heir sprung of his own body, though he might defeat the expectation of his collateral heirs (*y*). The allowing of such gifts as the above forms an important step in the progress of the right of alienation. For, when lands were given to a daughter on her marriage, the daughter and her husband, or the donees in *frank-marriage*, as they were called, held the lands granted to them and the heirs of their two bodies *free from all manner of service* to the donor or his heirs (an oath of fealty (*z*) excepted), until the fourth degree of consanguinity from the donor was passed (*a*); and the grantors of

Frank-
marriage

usually confirms after the grantor's death on his succession to the lordship created by the subinfeudation; and such a confirmation may be no more than a formal acknowledgment of the feudal tie. Doubtless in many cases the object of getting the heir's confirmation was to make valid a gift of land made by the ancestor without delivery of possession. See Madox, *Formulare Anglicanum*, Nos. 69—120, 285, 293, 295, 316, 319, 416,

419, 480, 484, 512, 525, 547; Cartulary of the Abbey of Ramsey, Rolls ed. i. 135, 139, 147, 154, 159; Glanv. vii. 1; Bract. fo. 889 a.

(*t*) Lib. vii. c. 1.

(*u*) See *ante*, pp. 14, 37, 38, 50.

(*v*) See *ante*, p. 37.

(*x*) Glanville, vii. 2.

(*y*) Glanville, vii. 1.

(*z*) *Ante*, pp. 44, 48.

(*a*) Glanville, vii. 18, Bract. fo. 21; Litt. ss. 17, 19, 20.

lands in frankalmoign were, as we have seen (*b*), for ever free from every kind of temporal service. So that in these cases little or nothing remained for the heir of the grantor. Nor was the heir always much better off if his ancestor granted part of his land in return for services. For though the services reserved on the grant might in some cases be a fair equivalent for the gift of the land, in others the main consideration for the gift was the payment of a sum of ready money to the grantor as a fine, and the services reserved were of little or no value and only intended to preserve an acknowledgment of the tenure (*c*). The current of decision, however, had set in favour of the right of alienation; and in Henry the Third's reign the son wholly disinherited by his father's alienation was denied any remedy at law (*d*). Bracton, writing in the same reign lays down (*e*) that, in the case of a gift of land to a man and his heirs, the donee acquires the land by gift, and his heir after him takes it by succession; but acquires nothing therein by the gift made to his ancestor. In other words, on the grant of a fee simple, the heir takes nothing by purchase (*f*), a term extended to any cause of acquisition of land by a man's own agreement and not by descent (*g*); he obtains only the expectation of inheritance, and has no estate or interest in the land (*h*). And this remains law to this day. So that ever since Bracton's time, a gift to a man

(*b*) *Ante*, p. 50.

(*c*) See Madox, *Form. Angl.*, Nos. 299, 300, 302—305, 311, 312, 313, 317, 320—323, 326, 327, 329, 330, 331, 460, 468, 472, 473, 509, 518; Rot. Hund. ii. 361—390, as to the tenure of and title to houses in Cambridge.

(*d*) Bracton's Note Book, case 1054.

(*e*) Fo. 17 a.

(*f*) Fleta, fo. 185; Britton, liv. 2, ch. 5, § 1.

(*g*) Litt. s. 12; Co. Litt. 18 b.

(*h*) An heir's expectancy is but W.R.P.

a bare possibility not assignable at law; *Ld. Kenyon, C. J., Jones v. Ros*, 3 T. R., 88, 93; *Carlton v. Leighton*, 3 Mer. 667. But it seems that an heir may make a contract dealing with his expectancy, and may be compelled to perform it specifically in equity; *Hobson v. Trevor*, 2 P. W. 191; *Wethered v. Wethered*, 2 Sim. 188; *Re Clarke*, 35 Ch. D. 109, 36 Ch. D. 348; *Tailby v. Official Receiver*, 18 App. Cases, 523, 529—531, 548.

and his heirs generally has enabled the grantee either entirely to defeat the expectation of his heir by an absolute conveyance in his lifetime, or to prejudice his heir's enjoyment of the descended lands, by obliging him to satisfy any debts or demands to the value of the lands according to the ancestor's discretion. For the very circumstance that the land was given to him and his heirs has enabled him to convey an interest in the land to last as long as his heirs continue to exist.

Progress of
right of
alienation as
against lord.

The interest of the lord in the land held by his tenant in fee was, it will be remembered, of two kinds; his right to the services reserved to him, and his chance of escheat. Subinfeudation by his tenant could not deprive him of his right to the services, which remained a charge upon the land into whose-soever hands it might come (*i*). But the enforcement of such services was rendered more difficult by the division of the lands into various ownerships (*j*). Accordingly we find it enacted in Magna Charta (*k*) that no free man should give or sell any more of his land than so as what remained might be sufficient to answer the services he owed to his lord. Subinfeudation, too, deprived the lord of some of the most valuable fruits of tenure; for the wardship and marriage (*l*) of infant heirs belonged to the lords of whom they immediately held their lands. But in spite of these consequences legal opinion pronounced in favour of the right of alienation. Bracton strenuously maintains that a donee of land may alien over without doing wrong to his lord, and any consequent loss of services by the latter is but *damnum sine injuria* (*m*). He also lays

(*i*) Bract. fo. 263 b; Co. Litt. 43 a.

(*j*) See Bract. fo. 156 a, 217 a.

(*k*) 2nd Charter of Henry III. c. 39; see Bracton's Note Book, case 1248.

(*l*) *Ante*, p. 45.

(*m*) Bract. fo. 45 b, 46 a, 263 b. I think it is evident that Bracton is here demolishing a contrary opinion. This supports the inference that the lord's consent had

down (*n*) that a tenant may absolve himself from his feudal obligation to his lord by disposing of his whole tenement to another in fee to hold of his lord, and that whether his lord will or no. The tenant could not, however, make a grant of part of his land to be holden of his lord without his lord's consent; for the services reserved on any grant were considered as entire and indivisible in their nature (*o*). Without his lord's consent the tenant could alien part of his land by subinfeudation only. The last step in the progress of alienation was the infringement of the lord's right of escheat. If a tenant in fee granted his land by way of subinfeudation to another and his heirs, the grantor's lord could have no chance of escheat, so long as the grantor had heirs to warrant his gift (*p*). But it appears that at first a tenant, who had no heirs, could not alien so as to bar his lord's claim to have the lands after his death as an escheat (*q*). As the advantages of a free power of disposition became apparent, a new form of grant was introduced with the object of bestowing the power of alienation, notwithstanding want of heirs of the donee. The lands were given, not merely to the tenant and his heirs, but to him and his heirs, *or to whomsoever he might wish to give or assign the land*, or with other words expressly conferring on the tenant the power of alienation (*r*). If the tenant under such a gift assigned his land to another in fee, the latter and his heirs had

been previously considered necessary to enable the tenant to make a valid gift of his land (*ante*, p. 63); and so, I think, does the fact that, if a grant of land were made in fee with a prohibition of alienation, the prohibition was considered valid in Bracton's time. fo. 46, 47, 263 b.

(*n*) Fo. 81 a.

(*o*) Co. Litt. 48 a.

(*p*) Bract. fo. 37 b; Fleta, fo. 178; Britton, liv. 2, ch. 4, § 2.

(*q*) Bract. fo. 11 b, 12 b, 20 a,

29 b, 30 a, 92 b, 134 a, 381 b, 390 a, 412 b; Fleta, fo. 178, 189, 191; Britton, liv. 2, ch. 3, § 5, ch. 4, § 2, ch. 6, § 1, ch. 16, § 3; liv. 3, ch. 4, § 2.

(*r*) It appears that attempts, which nearly succeeded, were made to gain the power of alienation by will by taking grants to the grantee and his heirs or to whomsoever he might give or *devise* the land; Bract. fo. 49 a, 381 b, 412 b.

the right to hold the land, on failure of the former's heirs, as tenants of the former's lord, who was by his original gift bound to warrant quiet possession to the assigns as well as the heirs of his donee (s). A power of alienation was thus bestowed, which postponed indefinitely the lord's right of escheat. And even when lands had been given to a tenant and his heirs only, his power of granting over the land, with full liberty of alienation for so long as his heirs should exist, made it increasingly difficult for his lord to secure the benefit of an escheat (t). In addition to this, it appears that early in the reign of Edward I. a further encroachment on the lord's interests was sanctioned by judicial opinion; for it seems then to have been considered that alienation in fee by a tenant holding to him and his heirs would deprive the lord of his escheat on failure of the tenant's heirs (u). The barons of the time of Edward I.

(s) Bract. fo. 17 b, 20 a, 87 b, 381 b; Bracton's Note Book, case 1289; Fleta, fo. 197.

Fines

(t) It is probable that the practice of conveying lands by fine worked adversely to the lord's interests. A fine was an agreement of compromise made by leave of the court between the parties originally to a genuine, but afterwards to a fictitious action, whereby the lands in question were acknowledged to be the right of one of them; and it was enrolled among the records of the court. A fine was so called because, having the effect of a judgment in a writ of right, the highest form of real action, it put an end, not only to the matter in dispute, but also to all claims to the land not made, when Bracton wrote, at the time of the fine, but in the reign of Edward I., within a year and a day afterwards. Parties having rights to land, of which they were not in possession, were thus liable to be barred of their rights by a fine levied (as it was said) by the tenant in possession, and non-claim on their part within due time unless they were under some disability. See Glanv. lib. viii.; Bract. fo. 435 b *et seq.*; Fleta, fo. 443; stat. 18 Edw. I. st. 4; Thomas of Weyland's case, Rot. Parl. i. 66; Plowd. 357; 2 Black. Comm. 348 *et seq.*; Cruise on Fines, ch. i. viii. An idea of the early prevalence of fines may be gained from an article by Mr. F. W. Maitland, Law Quarterly Review, vol. vi. p. 22.

Fine and non-claim.

(u) I think that this may be inferred from the preamble of stat. 18 Edw. I. c. 1, and from the doctrine which appears by the preamble of stat. 18 Edw. I. c. 1, to have been established as to the alienation of conditional fees; see

next chapter; see also Mirror, Abuses of the Common Law, § 50, & ch. v. sect. 5. We may note that it was settled in Bracton's time that if a tenant's heirs failed by his attainder for felony, his alienation in fee before committing

accordingly, perceiving that, by the continual subinfeudations of their tenants, their privileges as superior lords were being gradually taken away, procured the enactment in their favour of the before-mentioned statute of *Quia Emptores* (x). As we have seen, this statute recognized the right of every free tenant in fee simple to sell his land or part thereof at will; but prohibited the practice of subinfeudation by providing, that, on the alienation of land to be held in fee simple, the alienee should hold the land of the same immediate lord and by the same services as the alienor held it before. The Act further provided that, on the alienation in fee simple of part of a tenement, the alienee should hold it of the alienor's lord immediately, and should be charged with an amount of service to him proportionate to the extent of his purchase. The statute of *Quia Emptores* is still in force. Its effect has been to secure to every tenant in fee the right to substitute another in his place, as to the whole or part of his land, to hold as long as the new tenant's heirs may last, independently of the existence of any heirs of the former tenant: and that whether the land were originally given to the former tenant and his heirs only, or to him, his heirs and assigns (y). This statute did not extend to those who held of the king as tenants *in capite*, who were kept in restraint for some time longer. Free liberty of alienation was, however, subsequently acquired by them (u); and the right of disposing of an estate in fee simple by act

the felony could not be avoided either by his lord or the king; Bract. fo. 28, 29 b, 30, 180 a; see also *Thomas of Weyland's case*, Rot. Parl. i. 66.

(x) 18 Edw. I. c. 1; *ante*, p. 38.

(y) Apparently the Act was not immediately understood to have this effect; see Fleta, fo. 189, 191;

Britton, liv. 2, ch. 8, § 5, ch. 44, § 2, ch. 6, § 1, ch. 16, § 8; both of which treatises are of the time of Edw. I. and mention the statute. But eventually the law was so settled; see Litt. ss. 1, 465.

(u) See *ante*, pp. 38, n. (u), 45, n. (n).

inter vivos, is now the undisputed privilege of every tenant of such an estate.

Partial
alienation by
tenant in fee.

As a tenant in fee simple may alienate his whole estate, so he may dispose of any part of it. Thus he may freely grant to others estates for life or in tail, grant leases of his lands for any number of years, and charge on them the payment of any sum of money by way of mortgage or otherwise; and every such partial alienation will hold good against his heir and his lord, as well as the grant of his whole estate. The nature of the interests so created will be explained in subsequent chapters.

Alienation by
will.

The power of alienating lands by will was not generally obtained till a much later date than that of the statute of *Quia Emptores*. It has been mentioned that freeholds were not devisable by will at common law (*b*), in consequence of the rule laid down after the establishment of the law of feudal tenure, that delivery of possession in the tenant's lifetime was necessary to complete any gift of a free holding of land (*c*). In certain places however freehold lands were devisable by will by virtue of a special custom. Thus tenants in fee simple of gavelkind lands (*d*), and of lands held in burgage (*e*) in the City of London, and some other ancient cities and boroughs, enjoyed the privilege of devising their lands (*f*). In process of time a method of devising lands by will was covertly adopted by means of conveyances to other parties, *to such uses* as the

(*b*) *Ante*, p. 19. It appears, however, that before the Norman Conquest it was lawful in England to dispose of lands by will; see Kemble, *Codex Diplomaticus*, Introd. vol. i. pp. cxviii.—cxii. And it is noteworthy that the places, where lands were devisable after the Conquest, were precisely

those which had been successful in maintaining their ancient customs.

(*c*) *Glanv.* vii. 1, 5; *Bract.* fo. 88 b, 39 b, 270 a.

(*d*) *Ante*, p. 56.

(*e*) *Ante*, p. 42.

(*f*) *Bract.* fo. 49 a, 272 a, 409 b, 410; *Litt. ss.* 167—169.

person conveying should appoint by his will (g). This indirect mode of devising lands was intentionally restrained by the operation of a statute, passed in the reign of King Henry VIII. (h), known by the name of the Statute of Uses, to which we shall hereafter have occasion to make frequent reference. But only five years after the passing of this statute, lands were expressly rendered devisable by will. This great change in the law was effected by statutes of the 32nd and 34th of Henry VIII. (i), which empowered tenants in fee simple to devise all their lands holden in socage, but two-thirds only of those holden by knights' service. So that it was not until the year 1645, when all military tenures were turned into socage (k) that the right of devising freeholds by will became complete and universal. At present, every tenant in fee simple fully enjoys the right of alienating his lands by will under the Wills Act of 1837 (l).

Blackstone's explanation of an estate in fee simple is that a tenant in fee simple holds to him and his heirs for ever, generally, absolutely and simply, without mentioning *what* heirs, but referring that to his own pleasure, or the disposition of the law (m). But the idea of nominating an heir to succeed to the inheritance has no place in the English law, however it might have obtained in the Roman Jurisprudence. The heir is always appointed by the law, the maxim being *Solus Deus hæredem facere potest, non homo* (n); and all other persons, whom a tenant in fee simple may please to appoint as his successors, are not his *heirs* but his

The heir is appointed by law.

(g) Perk. ss. 528, 537.

(h) Stat. 27 Hen. VIII. c. 10.

(i) Stat. 32 Hen. VIII. c. 1, 34 & 35 Hen. VIII. c. 5; Co. Litt. 111 b, n. (1).

(k) *Ante*, p. 51.

(l) Stat. 7 Will. IV. & 1 Vict.

c. 27, s. 8.

(m) 2 Black. Comm. 104. See however 3 Black. Comm. 224, where the correct account is given.

(n) 1 Reeve's Hist. Eng. Law, 105; Co. Litt. 191 a, n. (1), vi. 2.

Assigns.

assigns. Thus, a purchaser from him in his lifetime, and a devisee under his will, are alike *assigns* in law, claiming in opposition to, and in exclusion of, the *heir* who would otherwise have become entitled (*o*).

Exceptions to
right of
alienation.

There are certain exceptions to the general power of disposition now incident to the ownership of lands. Some of these arise from the personal incapacity of the tenant, an instance of which has been noticed in the case of an infant, or person, under the age of twenty-one years (*p*). As the incidents of every estate in land may be affected by the personal incapacity of the tenant, the modifications made thereby will be explained in a subsequent part of the book. In the meantime, all that is said respecting a tenant of land, whatever his estate, must be understood as applying to the ordinary Englishman of full age and sound mind. Other exceptions to the power of alienating land arise in respect of the objects for which the disposition is made. Thus the alienation of land to or for the benefit of a corporation (*q*) into mortmain (*r*), otherwise than under the authority of a royal licence or a statute, is a cause of forfeiture to the lord of the fee; or if he fail to enter within a year, to his superior lord; and in default of entry thereon by any mesne lord, to the Crown (*s*). The penalty of forfeiture was originally imposed on the alienation of land into mortmain in order to prevent the gift of land to religious houses, whereby the king and the other lords were deprived of the services and fruits of tenure (*t*). And it was formerly

Alienation
into mort-
main.

(*o*) *Hogan v. Jackson*, Cowp. 805; Co. Litt. 191 a, n. (1), vi. 10.

(*p*) *Ante*, p. 55.

(*q*) A corporation is an artificial person, enjoying by fiction of law the capacity of holding property, and immortal existence; see *post*, ch. xii.

(*r*) See *ante*, p. 50, n. (*a*).

(*s*) Stat. 51 & 52 Vict. c. 42, s. 1, replacing stats. 7 Edw. I. st. 2, & 15 Ric. II. c. 5. Any superior lord must enter within six months after his inferior's right of entry has expired.

(*t*) See *ante*, p. 50.

necessary, in order to convey land into mortmain without incurring forfeiture, to have the licence not only of the Crown but also of the lord of the fee and every other mesne lord (*u*). But in modern times the rights of mesne lords having become comparatively trifling (*x*), the licence of the Crown alone has been rendered by Parliament sufficient for the purpose (*y*). So that at the present day, if a corporation be authorized to hold lands by royal licence or by statute, it will be no cause of forfeiture to convey lands to it. Again, the alienation of land for charitable purposes is placed under severe restrictions, which were first imposed by an Act of George II., commonly called the Mortmain Act (*a*), and now repealed and replaced by the Mortmain and Charitable Uses Act, 1888 (*b*). Under this Act, every assurance of any hereditaments, of any tenure (*c*), for any charitable uses, is void (*d*), unless made in accordance with the requirements of the Act (*e*).

Alienation of
land for
charitable
purposes.

(*u*) 2 Black. Comm. 262; Shelford on Mortmain, 85.

(*x*) See *ante*, pp. 52, 54, 60.

(*y*) Stat. 51 & 52 Vict. c. 42, s. 2, replacing stat. 7 & 8 Will. III. c. 37.

(*a*) Stat. 9 Geo. II., c. 36.

(*b*) Stat. 51 & 52 Vict. c. 42; see s. 13 and schedule; see also stat. 26 & 27 Vict. c. 106.

(*c*) See stat. 54 & 55 Vict. c. 74, s. 3.

(*d*) See *Churcher v. Martin*, 42 Ch. D. 312, decided on the Act of George II.

(*e*) The assurance must be made (i.) by deed, (ii.) executed before at least two witnesses, (iii.) twelve months at least before the assurer's death, and (iv.) enrolled in the central office of the Supreme Court within six months after execution; and (v.) must be made to take effect in possession immediately for the charitable use intended; and (vi.) must, as a rule, be without any provision for the benefit of the assurer or his successors.

Condition (iii.) is not imposed on sales of land to a charity for full value. Assurances of personal estate to be laid out in the purchase of land for a charity are subject to similar restrictions: but now, if personalty be directed to be so laid out by *will*, it shall be held for the benefit of the charity as though there had been no direction to buy land with it. See stats. 51 & 52 Vict. c. 42, s. 4; 54 & 55 Vict. c. 73. When land has been already devoted to charitable purposes, the conveyance thereof to other trustees, or to another charity does not fall within the purview of the Mortmain Act; *Walker v. Richardson*, 2 M. & W. 882; *A.-G. v. Glyn*, 12 Sin. 84; *Ashton v. Jones*, 28 Beav. 460. By stat. 38 & 34 Vict. c. 34, the investment on mortgage of land of any money held by any corporation or trustees for any public or charitable purpose is exempted from the conditions of the Mortmain Act, and

These prohibited the gift by *will* to a charity of any interest in land. But now, by an amending Act of 1891 (*f*), land may be assured by will to or for the benefit of any charitable use; but in such case it is required to be sold, as a rule, within one year from the testator's death. There are, however, several charitable institutions and objects, in favour of which the restrictions laid on the gift of land in charity are relaxed (*h*).

Voluntary conveyances.

By the judicial interpretation of a statute of Elizabeth (*i*), voluntary conveyances of any estate in lands, tenements, or other hereditaments whatsoever, and conveyances of such estates made (with any clause of revocation at the will of the grantor,) are void as against subsequent purchasers for money or other valuable consideration. The transfer of property as a free gift is called a voluntary conveyance; while a conveyance or a promise is said to be made for valuable consideration, when something is exacted in return for it; not necessarily the payment of money, but anything which is a burden on the party accepting the conveyance or promise, and on which the other sets a value (*k*). The effect of the statute of Elizabeth is that any person who has made a

Valuable consideration.

also from any forfeiture for alienation of land into mortmain.

(*f*) Stat. 54 & 55 Vict. c. 78, s. 5.

(*h*) See Stats. 51 & 52 Vict. c. 42, Part III.; 54 & 55 Vict. c. 78, s. 10; Shelford on Mortmain, 46—49, 57, 241, 255, 256; 1 Jarm. Wills, 241, 242, 4th ed.; Index to Statutes, Mortmain, 2, 3. As to the conveyance of land for sites for schools, see Stats. 4 & 5 Vict. c. 38, ss. 2, 10, 16; 7 & 8 Vict. c. 37, s. 3; 12 & 13 Vict. c. 49, ss. 24; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49; for sites for literary, scientific and like institutions, stat. 17 & 18 Vict. c. 112, ss. 1,

13, 14; for recreation grounds and playgrounds, stat. 22 Vict. c. 27; for sites for places of worship or burial, stats. 30 & 31 Vict. c. 133; 36 & 37 Vict. c. 50, ss. 1, 4; 45 & 46 Vict. c. 21; for dwellings for the working classes, stat. 53 & 54 Vict. c. 16.

(*i*) Stat. 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, s. 31; see 2 Dart V. & P. 1008 *et seq.*, 6th ed.

(*k*) See Holmes on the Common Law, 253, 267—271; 289—297; Pollock on Contracts, ch. iv. pp. 167 *et seq.*, 4th ed.; Dart V. & P. 1008 *et seq.*, 6th ed.

voluntary settlement of landed property, even on his own children, may afterwards sell the same property to any purchaser; and the purchaser, even though he have full notice of the settlement, will hold the lands without danger of interruption from persons on whom they had been previously settled (*l*). But if the settlement be founded on any valuable consideration, such as that of an intended marriage, it cannot be defeated (*m*). Moreover, if one, to whom land has been voluntarily conveyed, convey the same to another for value, the latter shall not be deprived of his right to the land by subsequent purchasers from the maker of the voluntary conveyance (*n*). Voluntary conveyances, and also conveyances tending to defraud creditors, though made for value, are further liable to become void as against creditors, as will be explained in treating of creditors' rights (*o*). Conveyances void as against creditors. *l. 261.*

Tenant in fee simple has the right of *free* enjoyment (*p*) to the fullest extent which is consistent with the security of his neighbours' persons and property (*q*). Thus he may open and work mines (*r*), quarry stone, dig for gravel, plough up ancient meadow land, cut timber, pull down buildings, and generally commit what waste he will (*s*); he may also cultivate his lands as he likes, or may build over them at his pleasure (*t*). But he must not do anything upon his own land which Free enjoyment by tenant in fee simple.

(*l*) *Upton v. Bassett*, Cro. Eliz. 444; 8 Rep. 83 a; Sug. V. & P. ch. 22, s. 1, 14th ed.; Sug. Pow. ch. 14, 8th ed.

(*m*) *Colville v. Parker*, Cro. Jac. 158; Sug. Pow. ch. 14, 8th ed.

(*n*) *Prodgers v. Langham*, 1 Sid. 138; Sug. V. & P. 719, 720; 2 Dart V. & P. 1019, 6th ed.

(*o*) *Post*, ch. xi.

(*p*) *Ante*, p. 2.

(*q*) Bract. 221 a, "Licitum est unicuique facere in suo quod damnum injuriosum non eveniet vicino."

(*r*) Except gold and silver mines, Royal mines. which belong to the Crown; *The case of Mines*, 1 Plowd. 310, 336; 1 Black. Comm. 295; *A.-G. v. Morgan*, 1891, 1 Ch. 432. See *ante*, p. 28.

(*s*) See 2 Inst. 299; 2 Black. Comm. 282.

(*t*) See *ante*, p. 59. The erection of new buildings in London and other towns is however controlled by statute; see Index to Statutes, Metropolis 2, Public Health 3, Towns 1 (b, 5).

is a nuisance to his neighbours; as carrying on any occupation, which endangers their lives or health, injures their property, or unreasonably interferes with their comfort (u). And if he bring on to his land any substance, such as water or filth, which is not naturally there, he must keep it in at his peril (x). As we shall see hereafter, the free enjoyment of a tenant in fee may be curtailed by the agreement of himself or his predecessors; as in the case of land subjected to rights of way, rights of common, or restrictions in equity as to its use.

Involuntary
alienation
of lands.

According to modern law, there is generally incident to ownership, not only the right of free disposition, but also the liability to what may be called involuntary alienation of the thing owned at the instance of the owner's creditors. And the lands of a tenant in fee simple are now liable to be taken to satisfy his debts of every kind, not only from his own hands in his lifetime, but also from the hands of his heir or devisee after his death, and even, we shall see, from the hands of purchasers from him. The liability of an estate in land to involuntary alienation affords another instance of a matter, in which the law has now attained a certain uniformity, but which cannot be well understood apart from its history. And the explanation of creditors' rights against land involves a long and complicated story. They are therefore reserved for subsequent consideration, more especially as they affect all estates in land (z). It may be useful, however, to give here the outlines of this liability to alienation at the instance of creditors. From the thirteenth year of

(u) See 3 Black. Comm. 216; Bac. Abr. Nuisance; Joyce on Injunctions, Part I. ch. 1, sect. 15; Kerr on Injunctions, ch. 6; Seton on Decrees, 219 *et seq.*

4th ed.

(x) *Rylands v. Fletcher*, L. R., 3 H. L. 330; *Ballard v. Tomlinson*, 29 Ch. D. 115.

(z) See *post*, ch. xi.

Edward I. one-half (a), and since the year 1838 the whole (b), of a man's freeholds has been liable to be taken *in execution of a judgment* (c) for debt or damages against him; the creditor having the right to hold the land so taken till his claim be satisfied out of the profits, and being enabled of late years to obtain a sale of the property and payment out of the proceeds (d). A man has been liable to be divested of his freeholds upon *bankruptcy* ever since a statute of Henry VIII. (e) first instituted bankruptcy proceedings; the gist of which, as the reader is probably aware, is the surrender of all a debtor's property for his creditors' benefit. And now, when a man is adjudged bankrupt, all his property becomes divisible amongst his creditors, and vests at once in a trustee for them (f). By the common law, as settled in Edward the First's reign, the heir of a tenant in fee simple was liable, to the extent of the land descended to him, to satisfy those debts, with the payment of which the late tenant had by special contract (that is, by sealed writing (g)), expressly charged his heir. And this liability was extended by an Act of William and Mary (h) to a devisee. Also, when testamentary alienation was permitted (i), fee simple estates were liable to debts charged thereon by the tenant's will. But it was not until the year 1833 that they were subjected to debts of the deceased tenant made without so binding his heir. Since then, however, fee simple estates, whether devised by will or allowed to descend to the heir, have been liable to the payment of all their late owner's debts, including his ordinary debts incurred without sealed writing, which are called

(a) Stat. 18 Edw. I. c. 18.

(b) Stat. 1 & 2 Vict. c. 110, s.

11. (c) See *ante*, p. 28, note (x) thereto.

(d) See stats. 1 & 2 Vict. c. 110, s. 18; 27 & 28 Vict. c. 112, ss. 4-6.

(e) Stat. 34 & 35 Hen. VIII/

c. 4.

(f) Stat. 46 & 47 Vict. c. 52, s. 90.

(g) *Ante*, pp. 17, n., 81, n. (o).

(h) Stat. 3 Will. & Mary, c. 14.

(i) *Ante*, p. 71.

Crown debts. simple contract debts (*k*). It may also be mentioned here that special privileges are accorded to the Crown, for the recovery of debts due to it, in the way of seizure of the debtor's lands.

The right and liability to alienation inherent in ownership.

Gift may be confined to period of personal enjoyment.

So inherent in ownership is the right of alienation (*l*) that it is impossible for any owner to be divested of it, and yet retain the other advantages of property. And in the same manner the liability of property to alienation for debt cannot by any means be got rid of (*m*). So long as any estate in land is in the hands of any person, so long does his power of disposition continue (*n*), and so long also continues his liability to have the estate taken from him to satisfy the demands of his creditors (*o*). And any attempt to annex a general restriction on alienation to a gift of any property is void, as being repugnant to the gift (*p*). It is, however, possible to confine the duration of a gift to the period during which it can be personally enjoyed by the grantee. Thus one may give land to or in trust for another until he shall dispose of the same, or shall become bankrupt, or until any act or event shall occur, which would cause his personal enjoyment thereof to cease. Personal property may be settled in the same way (*q*). And this is frequently done. In such cases, if the grantee become bankrupt or attempt to or make any disposition of the property, it will not vest in the creditors' trustee, or follow the intended disposition; but the interest which had been given to the grantee will thenceforth entirely cease, in the same manner as where lands are given to a

(*k*) See stats. 8 & 4 Will. IV. c. 104; 32 & 33 Vict. c. 46.

(*l*) See *ante*, p. 2.

(*m*) 2 Jarm. Wills, 18, 14, 22 *et seq.*, 4th ed.

(*n*) Litt. s. 360; Co. Litt. 206 b; 223 a.

(*o*) *Brandon v. Robinson*, 18 Ves. 429, 438.

(*p*) See 2 Jarm. Wills, 13—22, 4th ed.; Williams on Settlements, 134—136; *Re Dugdale*, 38 Ch. D. 176; cf. *ante*, p. 66, n. (*m*).

(*q*) *Lockyer v. Savage*, 2 Str. 947; *Re Hinton*, 14 Ves. 598; Kay, J., *Re Dugdale*, 38 Ch. D. 176, 180, 181; 2 Jarm. Wills, 30 *et seq.* 4th ed.

person for life his interest terminates at his death. If, however, a man attempt to settle his *own* property in such a way that he shall enjoy the same until his bankruptcy, on the happening of which, his interest therein shall cease, and the property go over to some other person than the creditors' trustee, the attempted settlement will in general be void as a fraud on the bankruptcy laws (*r*). An exception to this rule prohibiting restriction on alienation occurs in the case of a woman, who is permitted to have property settled on her in such a way that she cannot when married make any disposition of it during the coverture or marriage; but this mode of settlement is of comparatively modern date (*s*). There are also certain cases in which the personal enjoyment of property is essential to the performance of certain public duties, and in which no alienation of such property can be made; thus a benefice with cure of souls cannot be directly charged or encumbered (*t*). So offices concerning the administration of justice, and pensions and salaries given by the State for the support of the grantee in the performance of present or future duties, cannot be aliened (*u*);

(*r*) *Higinbotham v. Holmes*, 19 Ves. 88. See *Lester v. Garland*, 5 Sim. 205; *Holmes v. Penny*, 3 K. & J. 90; *Brooke v. Pearson*, 27 Beav. 181; *Knight v. Browne*, 7 Jur. N. S. 894; *Ex pte. Mackay*, L. R., 8 Ch. 643; *Ex pte. Jay*, 14 Ch. D. 19; *Re Detmold*, 40 Ch. D. 585; Davidson's *Precedents in Conveyancing*, Vol. III. 108—141, 3rd ed.; 2 Key & Elphinstone, *Prec. Conv.* 441 n. 2nd ed.

(*s*) *Brandon v. Robinson*, 18 Ves. 484; *Tullett v. Armstrong*, 1 Beav. 1; 4 M. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 84; 4 M. & Cr. 377; stat. 45 & 46 Vict. c. 75, s. 19; Williams on *Personal Property*, 494—496, 503, 18th ed.

(*t*) *Stats.* 18 Eliz. c. 20; 57 Geo. III. c. 99, s. 1; 1 & 2 Vict.

c. 106, s. 1; *Shaw v. Pritchard*, 10 Barn. & Cress. 241; *Long v. Storie*, 8 De Gex & Smale, 308; *Hawkins v. Gathercole*, 8 De Gex. M. & G. 1. But a sequestration of the profits of a benefice may be obtained in execution of a judgment against, or on the bankruptcy of, a beneficed clergyman; 3 Black. Comm. 418; Rules of the Supreme Court, 1883, Order XLIII. rr. 8—5, Appendix H., No. 7; stat. 46 & 47 Vict. c. 52, s. 52.

(*u*) *Flarty v. Odium*, 8 T. Rep. 681; *Lidderdale v. Duke of Montrose*, 4 T. R. 248; *Wells v. Foster*, 8 M. & W. 149; *Apthorpe v. Apthorpe*, 12 P. D. 192; stat. 5 & 6 Edw. VI. c. 16; 49 Geo. III. c. 126. But, in case of bankruptcy, the whole or part of the income arising from any office

though pensions for past services are, generally speaking, not within the rule (x).

Husbands
and wives.

In addition to the interests which may be created by alienation, either voluntary or involuntary, there are certain rights conferred by law on husbands and wives in each other's lands, by means of which the descent of an estate, from an ancestor to his heir, may partially be defeated. These rights will be the subject of a future chapter. If, however, the tenant in fee simple should not have disposed of his estate in his lifetime, or by his will, and if it should not be swallowed up by his debts, his lands will descend (subject to any rights of his wife) to the heir at law.

The heir at
law.

The heir, as we have before observed (y) is a person appointed by the law. He is called into existence by his ancestor's decease, for no man during his lifetime can have an heir. *Nemo est hæres viventis*. A man

Heir
apparent.

may have an *heir apparent*, or an *heir presumptive*, but until his decease he has no *heir*. The *heir apparent* is the person who, if he survive the ancestor, must certainly be his heir, as the eldest son in the lifetime of his father. The *heir presumptive* is the person who, though not certain to be heir at all events, should he survive, would yet be the heir in case of the ancestor's immediate decease. Thus an only daughter is the heiress presumptive of her father: if he were now to die, she would at once be his heir; but she is not certain of being heir, for her father may have a son, who would supplant her, and become heir apparent during the father's lifetime, and his heir after his

Heir
presumptive.

or pension of the bankrupt may be ordered to be paid to the trustee for division amongst the creditors; stat. 46 & 47 Vict. c. 52, s. 53; *Ex parte Huggins*, 21 Ch. D. 85.

(x) *M'Carthy v. Gould*, 1 Ball & Beatty, 387; *Tunstal v. Boothby*,

10 Sim. 542; *Willcock v. Terrall*, 8 Ex. D. 323, 334. But see stat. 28 & 29 Vict. c. 78, ss. 4, 5; 44 & 45 Vict. c. 58, s. 141; *Lucas v. Harris*, 18 Q. B. D. 127; *Crowe v. Price*, 22 Q. B. D. 429.

(y) *Ante*, p. 71.

decease. An heir at law is the only person in whom the law of England vests property, whether he will or not. If I make a conveyance of land to a person in my lifetime, or leave him any property by my will, he may, if he pleases, disclaim taking it, and in such case it will not vest in him against his will (2). But an heir at law, immediately on the decease of his ancestor, becomes presumptively possessed, or seised in law, of all his lands (a). No disclaimer that he may make will have any effect, though, of course, he may, as soon as he pleases, dispose of the property by an ordinary conveyance. A title as heir at law is not nearly so frequent now as it was in the times when the right of alienation was more restricted. And when it does occur it is often established with difficulty. This difficulty arises more from the nature of the facts to be proved, than from any uncertainty in the law. For the rules of descent have now attained an almost mathematical accuracy, so that, if the facts are rightly given, the heir at law can at once be pointed out. The accuracy of the law has arisen by degrees, by the successive determination of disputed points. Thus, in the time of Henry II., when the laws of tenure were beginning to be generally developed (b), an estate of inheritance held by military tenure descended first to the former tenant's eldest or only son; whilst an inheritance held in socage was divisible amongst all the sons, or passed to the eldest or youngest son, according to the course of descent dictated by ancient custom. In default of sons, all the daughters succeeded in equal shares. If the late tenant had left no children, the descendants of children (c) were the next heirs. In default of lineal descendants, the brothers and sisters came in; and if they were dead, their children; then the uncles and

The heir
cannot
disclaim.

Gradual
progress of
the law of
descents.

(a) *Nicolson v. Wordworth*, 2 26 (4th ed. 84)
Swanst. 365, 372.

(b) *Ando*, p. 14.

(c) *Watkins on Descents*, 25,

(c) *Glanv. lib. vii. c. 8.*

their children ; and then the aunts and their children ; males being always preferred to females (*d*). Subsequently, about the time of Henry III. (*e*), the old Saxon rule, which divided the inheritance equally amongst all males of the same degree, and which had hitherto prevailed as to all lands not actually the subjects of feudal tenure (*f*), gave place to the feudal law introduced by the Normans, of descent to the eldest son or eldest brother ; though among females the estate was still equally divided, as it is at present. And, about the same time, all descendants *in infinitum* of any person who would have been heir if living, were allowed to inherit by right of representation. Thus, if the eldest son died in the lifetime of his father, and left issue, *that* issue, though a grandson or granddaughter only, was to be preferred in inheritance before any younger son (*g*). The father, moreover, or any other lineal ancestor, was never allowed to succeed as heir to his son or other descendant ; neither were kindred of the half-blood admitted to inherit (*h*). The rules of descent, thus gradually fixed, long remained unaltered. Lord Hale, in whose time they had continued the same for above 400 years, was the first to reduce them to a series of canons (*i*) ; which was afterwards admirably explained and illustrated by Blackstone, in his well-known Commentaries ; nor was any alteration made till the enactment of the Act for the amendment of the law of inheritance (*k*), A. D. 1833. By this Act, amongst other important alterations, the father is heir to his son, supposing the latter to leave no issue ; and all lineal

(*d*) 1 Reeves's Hist. Eng. Law, 43.

(*e*) 1 Reeve's Hist. 310; 2 Black. Comm. 215; Co. Litt. 191 a, note (1), vi. 4.

(*f*) *Clements v. Sandaman*, 1 P. Wms. 64; 2 Lord Raymond, 1024; 1 Scriv. Cop. 53.

(*g*) 1 Reeves's Hist. 310.

(*h*) 2 Black. Comm. c. 14.

(*i*) Hale's Hist. Com. Law, 6th ed., p. 318 *et seq.*

(*k*) Stat. 3 & 4 Will. IV. c. 106, amended by stat. 22 & 23 Vict. c. 35, ss. 19, 20.

ancestors are rendered capable of being heirs (*l*); relations of the half-blood are also admitted to succeed, though only on failure of relations in the same degree of the whole blood (*m*). The Act has, moreover, settled a doubtful point in the law of descent to distant heirs. The rules of descent, as modified by this Act, will be found at large in the ninth chapter.

(*l*) Stat. 3 & 4 Will. IV. c. 106, s. 6.

(*m*) Sect. 9.

CHAPTER III.

OF AN ESTATE TAIL.

Estate tail.

General or special.

Male or female.

[HAVING considered the incidents of the greatest estate of freehold, that in fee simple (the most absolute property in land which a subject may enjoy) (a), let us proceed to examine the lesser estates of freehold. Of these we shall first notice an estate tail, or an estate given to a man *and the heirs of his body*. This is such an estate as will, if left to itself, descend, on the decease of the first owner, to all his lawful issue,—children, grand-children, and more remote descendants, so long as his posterity endures,—in a regular order and course of descent from one to another: and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine. An estate tail may be either *general*, that is, to the heirs of his body generally and without restriction, in which case the estate will be descendible to every one of his lawful posterity in due course; or *special*, when it is restrained to certain heirs of his body, and does not go to all of them in general; thus, if an estate be given to a man and the heirs of his body by a particular wife; here none can inherit but such as are his issue by the wife specified. Estates tail may be also in *tail male*, or in *tail female*; an estate in *tail male* cannot descend to any but males, and male descendants of males; and cannot, consequently, belong to any one who does not bear the surname of his ancestor from whom he inherited: so an estate in *tail female* can only descend to

(a) *Ante*, p. 6.

females, and female descendants of females (a). Special estates tail, confined to the issue by a particular wife, are not now common: the most usual kinds of estates tail now given are estates in tail general, and in tail male. Tail female scarcely ever occurs.

The owner of an estate tail is called a *donee* in tail, Donee in tail. and the person who has given him the estate tail is called the *donor*. And here it may be remarked, that such correlative words as *donor* and *donee*, *lessor* and *lessee*, and many others of a like termination, are used in law to distinguish the person from whom an act proceeds, from the person for or towards whom it is done. The owner of an estate tail is also called a *tenant in tail*, for he holds his land of some lord, as much as a tenant in fee simple (b), only for a less estate. But a tenant in tail in possession of land now largely enjoys the advantages of ownership; and, as we shall see, it has long been in his power to *bar the entail*, and thus convert his estate into an estate in fee simple. To explain the nature of an estate tail and its incidents we must refer briefly to its history.

The reader has been so far made acquainted with the course of descent of a fee (c) as to be aware that, as early as the time of Henry II., if the tenant of a fee left no issue, his collateral relations were admitted to succeed as his heirs (d). So that an estate, which had been granted to a man and his heirs, descended, on his death, not only to his offspring, but also, in default of offspring, to his other relations in a defined order of succession. Hence if it were wished to confine the inheritance to the offspring of the donee, it became necessary to limit the estate expressly to him *and the*

Collateral relations might inherit a fee.

(a) Litt. ss. 13, 14, 15, 16, 21; (c) *Ante*, p. 18.
 2 Black. Comm. 113, 114. (d) *Ante*, p. 81.
 (b) *Ante*, pp. 6, 7, 36—41.

To the donee
and the heirs
of his body.

A conditional
gift.

heirs of his body (e), making what was then called a *conditional gift*, by reason of the condition implied in the donation, that if the donee died without such particular heirs, or in case of the failure of such heirs at any future time, the land should revert to the donor (f). Such a condition was especially implied in a gift of land in frank marriage (g). In such cases, therefore, the collateral relations of the donee could never inherit the land as his heirs: for if his issue failed, the donor might resume possession of the land (h). But, as in the case of simple fees (i), the donee of a fee granted by such a conditional gift gradually acquired the power of alienating the land, first, as against his issue, and then as against his lord. For when one seised of land in fee simple gave it to another and the heirs of his body, this was necessarily accomplished by subinfeudation, and the donor and his heirs remained the lords of the donee and the heirs of his body, who became their tenants (k).

Growth of
power of
alienating
land given to
a man and
the heirs of
his body.

The doctrine, that the heir can only claim by succession, not by purchase (l), was applied to conditional as well as simple fees (m). This enabled the donee of land to himself and the heirs of his body to dispose of the land as against such heirs (n). If however the donee had no such heir, or if he had such an heir, who afterwards died without issue, the intention of the gift was, in either case, that the land should revert to the donor. No alienation by the donee was allowed to prevent this in the former case (o): but in the latter case it was otherwise. For early in the reign of Edward I. it seems to have been considered that, in the case of a

(e) Bract. fo. 17 b, 47 a, 68 b, 69 a; Co. Litt. 290 b, n. (1) V. 1.

(f) 2 Black. Comm. 110.
(g) *Ante*, p. 64; Bract. fo. 20 b.

(h) Bract. fo. 69 a.
(i) *Ante*, p. 18.

(k) *Ante*, p. 37.

(l) *Ante*, p. 65.

(m) Bract. fo. 17 b.

(n) Bracton's Note Book, case 566; Y. B. 44 Edw. III. 3 a, pl. 18.

(o) Fitz. Abr. Formedon, 68.

gift of land to a man and the heirs of his body, or a similar conditional gift, the birth of issue was a performance of the condition, so as to enable the donee to alien in fee. Upon the birth of issue therefore the donee could dispose of the land to another and his heirs generally; and it was held that such alienation would prevent the land from reverting to the donor, if the issue of the donee came afterwards to an end (*p*). So too, if the donor had given over the land to some third person in case of the failure of issue of the first donee,—conferring what was afterwards known as an estate *in remainder* expectant on the determination of the interest of the first donee (*q*),—it appears that alienation by the first donee after the birth of issue might have deprived such third person of his right to have the land, if the issue failed. The original intention of such gifts was therefore in a great measure defeated; originally, on failure of the issue the lands reverted to the donor, or remained to the person whom the donor had appointed to succeed in that event; but now nothing was requisite but the mere birth of issue to give the donee a complete power of disposition.

[The mere existence of an expectant heir having thus grown up into a reason for alienation, the barons of the time of Edward I. began to feel how small was the possibility that the lands, which they had granted by conditional gifts to their tenants and the heirs of their bodies, should ever revert to themselves again; whilst at the same time they perceived the power of their own

(*p*) Stat. 13 Edw. I. c. 1, preamble; Fitz. Abr. Formedon, 62, 65; Plowd. 246; Co. Litt. 19 a; 2 Inst. 333. Conveyance by fine (*ante*, p. 68, n. (*t*)) seems to have been used to bar the donor's right to the reversion of the lands on failure of issue; Fleta, fo. 294

(§ 53), 295 (§ 4); Britton (ed. Nichols), vol. ii. p. 152 and note (*m*); Mirror, ch. v. sect. 5. (*q*) As to such gifts, see Bract. fo. 18 b, 67 a, 69 a, 262 b; and an article by Professor Maitland in the Law Quarterly Review, vol. vi. p. 22.

Statute *De
Donis.*

families weakened by successive alienations. To remedy these evils, it was enacted in the reign of Edward I. 1212 by the famous statute *De Donis Conditionalibus* (s),—and no doubt as was then thought finally enacted,—that the will of the donor, according to the form in the deed of gift manifestly expressed, should be from thenceforth observed; so that they, to whom the tenement was given, should have no power to alien it, whereby it should fail to remain unto their own issue after their death, or to revert unto the donor or his heirs, if issue should fail.

Fee tail.

Since the passing of this statute, an estate given to a man and the heirs of his body has been always called an estate tail, or, more properly, an estate in *fee tail* (*feudum talliatum*). The word *tail* is derived from the French word *tailler*, to cut, the inheritance being by the statute *De Donis*, cut down and confined to the heirs of the body strictly (t); but, though an estate tail still bears a name indicative of a restriction of the inheritance from any interruption in its course of perpetual descent from father to son, we shall find that in fact the right to establish such exclusive perpetual descent has long since been abolished. When the statute began to operate, the inconvenience of the strict entails, created under its authority, became sensibly felt; children, it is said, grew disobedient when they knew they could not be set aside; farmers were deprived of their leases; creditors were defrauded of their debts; and innumerable latent entails were produced to deprive purchasers of the land they had fairly bought; treasons also were encouraged, as estates tail were not liable to forfeiture longer than for the tenant's

Inconvenience
of strict
entails.

(s) Stat. 18 Edw. I. c. 1, called also the Statute of Westminster the Second.

(t) Litt. s. 18. Co. Litt. 18 b, 327 a. n. (2); Wright's Tenures, 187; 2 Black. Comm. 112.

life (u). The nobility, however, would not consent to a repeal, which was many times attempted by the commons (x), and the Act has never been directly repealed. But at length means were found of evading its operation; for the judges, in construing the statute, had admitted a principle, which afterwards gave a handle to overturn it altogether. It was held that if the tenant in tail disposed of the land, but left assets, or lands of equal value, to his issue, the issue were bound to abide by his alienation of the entailed lands (y). This seems fair enough, but the principle of recompense in value was afterwards extended so as to bar the issue from asserting their rights to the entailed lands, if a mere *judgment* had been given entitling them to recover from some other person lands of equal value instead. It is uncertain when this extension of the principle was first admitted (z): but it was recognized in a case, called *Taltarum's case*, decided in the twelfth year of the reign of King Edward IV. (a). And as the principle so extended was allowed to hold good, although the judgment for recovery in value had been obtained by collusion with the tenant in tail, the result was to secure the practical abolition of the law of entail. For it became possible for any one possessed of land as tenant in tail to get rid of the entail by taking the requisite judicial proceedings.

Alienation by
tenant in
tail.

Principle of
recompense in
value barring
issue in
tail.

*Taltarum's
case.*

By the common law, final judgment for the recovery of land in a writ of right, the highest form of real action, was in general conclusive of the right to the land (b). This afforded to a tenant in possession of

(u) 2 Black. Comm. 116.

(x) 2 Cruise on Recoveries, 9, 10, 3rd ed.

(y) 2 Cruise on Recoveries, 214—217; Litt. s. 712; Co. Litt. 373 b, note (2), 374 b.

(z) See an article by Mr. H. W. Elphinstone in the Law Quarterly

Review, vol. vi. p. 280.

(a) Y. B. 12 Edw. IV. 19, translated in Tudor's Leading Cases on Real Property, 695, 3rd ed.; Cruise on Recoveries, 217—219.

(b) See Bract. fo. 435 b *et seq.*; Fleta, fo. 443; F. N. B. 6;

Suffering a
recovery.

Warranty.

Vouching to
warranty.

land an opportunity, in certain cases, of defeating the lawful claims of others to the land, by suffering a recovery of the land to be obtained in a collusive action brought against him. Such proceedings were in fact used to deprive termors of their leases, and by ecclesiastics to evade the statute of Mortmain (*c*), until it was provided by statute (*d*) that in such cases collusive recoveries might be falsified, or annulled (*e*). And, under the statute *De Donis*, if a tenant in tail merely suffered judgment for the recovery of his lands to be obtained in a friendly action against him, it was held that his issue after his death might falsify the recovery, and gain possession of the entailed lands (*f*). Recourse was had therefore to the law of warranty (*g*), whereby one, who had warranted the title to lands given by him to another, was liable to be *vouched to warranty*, that is, called upon to defend any action brought to recover the lands, and to be adjudged to render to his donee lands of equal value, if he failed in his defence (*h*). The tenant in tail then, on the collusive action being brought, vouched to warranty some third person, presumed to have been the original grantor of the estate tail. This third person was accordingly called on; who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he appeared in Court and admitted the alleged warranty, and then allowed judgment to go against him by default. Whereupon judgment was given for the demandant or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompense in lands of *equal value* from the defaulter,

Plowd. 357; Cruise on Fines and Recoveries, i. 159 *et seq.*, ii. 1.

(*c*) See *ante*, pp. 50, 72.

(*d*) See *stats.* 6 Edw. I. c. 11; 18 Edw. I. c. 8, 4, 32; 21 Hen. VIII. c. 15; Co. Litt. 46 a.

(*e*) Cruise on Recoveries, 2—4,

187, 356.

(*f*) Litt. ss. 688—690; Co. Litt. 381 a.

(*g*) See *ante*, pp. 37, 64.

(*h*) See Glanv. lib. iii.; Bract. fo. 380 *et seq.*

who had thus cruelly failed in defending his title (*i*). If any such lands *had* been recovered under the judgment, they would have been held by the tenant for an estate tail, and would have descended to the issue, in lieu of those which were lost by the warrantor's default (*k*). But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of straw, who could easily be prevailed on to undertake the responsibility; and, in later times, the crier of the Court was usually employed. Still, on the principle above stated (*l*), the mere judgment for recovery in value was held to preclude the issue from subsequently asserting their right to the lands; so that their claim was effectually defeated, and the estate tail was said to be *barred*. And not only were the issue barred of their right, but the donor, who had made the grant, and to whom the lands were to revert on failure of issue, had his reversion barred at the same time (*m*). So also all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue, (and which estates, as we have seen (*n*), are called *remainders* expectant on the estate tail,) were equally barred. The demandant, in whose favour judgment was given, became possessed of an estate in fee simple in the lands; for in a recovery the lands were always claimed in fee simple (*o*), and the demandant, being a friend of the tenant in tail, of course disposed of the estate in fee simple according to his wishes.

Entail barred.

The reversion barred.

And remainders.

Such a piece of solemn juggling could not long have held its ground, had it not been supported by its substantial benefit to the community; but, as it was, the

(i) Co. Litt. 361 b; 2 Black. Com. 358.

(k) 2 Black. Com. 360.

(l) *Ante*, p. 89.

(m) 2 Black. Com. 360;

Cruise on Recoveries, 187, 258.

(n) *Ante*, p. 87.

(o) Co. Litt. 9 b; Cruise on Recoveries, 15.

Common
recoveries.

progress of events tended only to make that certain which at first was questionable; and proceedings on the principle of those above related, under the name of suffering *common recoveries*, maintained their ground and long continued in common use as the undoubted privilege of every tenant in tail. The right to suffer a common recovery was considered as the inseparable incident of an estate tail, and every attempt to restrain this right was held void (oo). Complex, however, as the proceedings above related may appear, the ordinary forms of a *common recovery* in later times were more complicated still; for it was found expedient not to bring the collusive action against the tenant in tail himself, but that he should come in as one vouched to warranty (p). The lands were, therefore, in the first place conveyed, by a deed called the recovery deed, to a person against whom the action was to be brought, and who was called the tenant to the *præcipe* or writ (q). The proceedings then took place in the Court of Common Pleas, which had an exclusive jurisdiction in all real actions. A regular writ was issued against the tenant to the *præcipe* by another person, called the *demandant*; the tenant in tail was then vouched to warranty by the tenant to the *præcipe*. The tenant in tail, on being vouched, then vouched to warranty in the same way the crier of the Court, who was called the common vouchee. The demandant then craved leave to imparl or confer with the last vouchee in private, which was granted by the Court; and the vouchee, having thus got out of Court, did not return; in consequence of which judgment was given

Tenant to the
præcipe.

Demandant.

(oo) *Mary Portington's case*, 10 Rep. 86; Co. Litt. 224 a, 379 b, n. (1); Fearne on Contingent Remainders, 280; 2 Black. Comm. 116; *Dawkins v. Lord Penrhyn*, 6 Ch. D. 812; 4 App. Cas. 51.

(p) See Cruise on Recoveries, 244 *et seq.*

(q) By stat. 14 Geo. II c. 20, commonly called Mr. Pigott's Act,

it was sufficient if the conveyance to the tenant to the *præcipe* appeared to be executed before the end of the term in which the recovery was suffered; 1 Prest. Con. 61 *et seq.*; *Goodright d. Burton v. Rigny*, 5 T. Rep. 177. Recoveries, being in form judicial proceedings, could only be suffered in term time.

in the manner before mentioned, on which a regular writ was directed to the sheriff to put the demandant into possession (*r*). The proceedings, as may be supposed, necessarily passed through numerous hands, so that mistakes were not unfrequently made, and great expense was always incurred (*s*). To remedy this evil, an Act of Parliament (*t*) was accordingly passed in the year 1833, on the recommendation of the commissioners on the law of real property. This Act, which in the wisdom of its design, and the skill of its execution, is quite a model of legislative reform, abolished the whole of the cumbrous and suspicious-looking machinery of common recoveries. It has substituted in their place a simple deed, executed by the tenant in tail and inrolled, formerly in the Court of Chancery, and now in the Central Office of the Supreme Court (*u*): by such a deed, a tenant in tail in possession is now enabled to dispose of the lands entailed for an estate in fee simple; thus at once defeating the claims of his issue, and of all persons having any estates in remainder or reversion.

Recoveries
abolished.

A common recovery was not, in later times, the only way in which an estate tail might be barred. There was another assurance as effectual in defeating the claim of the issue, though it was inoperative as to the remainders and reversion. This was a fine. The nature of a fine and its effect in barring all claims to the land not made within a year and a day afterwards has been previously explained (*x*). If a fine were levied of

A fine.

(*r*) Cruise on Recoveries, ch. 1, p. 12.

(*s*) See 1st Report of Real Property Commissioners, 25.

(*t*) "An Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance." Stat. 3 & 4 Will. IV. c. 74, drawn by Mr. Brodie; 1 Hayes's Conveyancing, 155.

(*u*) The inrolment must be within six calendar months after the execution; sect. 41. See sect. 74; stats. 36 & 37 Vict. c. 66, ss. 16, 77; 42 and 43 Vict. c. 78; Rules of the Supreme Court, 1883, Ord. LXI. r. 9.

(*x*) *Ante*, pp. 68, n. (*t*), 87, n. (*p*).

Proclama-
tions.

Fines
abolished.

entailed lands, the rights of the issue and of those to whom the reversion belonged, were expressly saved by the statute *De Donis* (y) from being barred under the old doctrine of non-claim. The power of barring future claims was taken from fines in the reign of Edward III. (z); but it was again restored, with an extension however of the time of claim to five years, by statutes of Richard III. (a) and Henry VII. (b); by which statutes also provision was made for the open proclamation of all fines several times in Court, during which proclamation all pleas were to cease; and in order that a fine might operate as a bar after non-claim for five years, it was necessary that it should be levied with proclamations (c). A judicial construction of the statute of Henry VII. (d), quite apart, as it should seem, from its real intention (e), gave to a fine by a tenant in tail the force of a bar to his issue after non-claim by them for five years after the fine; and this construction was confirmed by a statute of the reign of Henry VIII., which made the bar immediate (f). Since this time the effect of fines in barring an entail, so far as the issue were concerned, remained unquestioned till their abolition; which took place at the same time, and by the same Act of Parliament (g), as the abolition of common recoveries. A deed inrolled in the Central

(y) Stat. 18 Edw. I. c. 1.

(z) Stat. 84 Edw. III. c. 16, a curious specimen of the conciseness of ancient Acts of Parliament. This is the whole of it: "Also it is accorded that the plea of non-claim of fines, which from henceforth shall be levied, shall not be taken or holden for any bar in time to come."

(a) 1 Rich. III. c. 7.

(b) 4 Hen. VII. c. 24; see also stat. 31 Eliz. c. 2.

(c) By stat. 11 & 12 Vict. c. 70, all fines heretofore levied in the Court of Common Pleas shall be conclusively deemed to have

been levied with proclamations, and shall have the force and effect of fines with proclamations.

(d) Bro. Abr. tit. Fine, pl. 1; Dyer, 8 a; Co. Litt. 121 a, n. (1); Cruise on Fines, 178.

(e) 4 Reeve's Hist. Eng. Law, 135, 138; 1 Hallam's Const. Hist. 14, 17. The deep designs attributed by Blackstone (2 Black. Comm. 118, 354) and some others to Henry VII. in procuring the passing of this statute, are shown by the above writers to have most probably had no existence.

(f) 32 Hen. VIII. c. 38.

(g) 3 & 4 Will. IV. c. 74.

Office of the Supreme Court (*h*) is now substituted, as well for a fine, as for a common recovery.

Although strict and continuous entails have long been virtually abolished, their remembrance seems still to linger in many country places, where the notion of *heir land*, that must perpetually descend from father to son, is still to be met with. It is needless to say that such a notion is quite incorrect. In families where the estates are kept up from one generation to another, settlements are made every few years for this purpose; Settlements. thus in the event of a marriage, a life estate merely is given to the husband; the wife has an allowance for pin-money during the marriage, and a rent-charge or annuity by way of jointure for her life, in case she should survive her husband. Subject to this jointure, and to the payment of such sums as may be agreed on for the portions of the daughters and younger sons of the marriage, *the eldest son who may be born of the marriage is made by the settlement tenant in tail*. In case of his decease without issue, it is provided that the second son, and then the third, should in like manner be tenant in tail; and so on to the others; and in default of sons, the estate is usually given to the daughters. By this means the estate is tied up till some tenant in tail attains the age of twenty-one years; when he is able, with the consent of his father, who is tenant for life, to bar the entail with all the remainders. Dominion is thus again acquired over the property, which dominion is usually exercised in a re-settlement on the next generation; and thus the property is preserved in the family. Primogeniture, therefore, as it obtains among the landed gentry of England, is a *custom* only, and not a *right*; though there can be no doubt that the custom has originated in the right, which

(*h*) Stats. 36 & 37 Vict. c. 66. Rules of the Supreme Court, 1883, ss. 16, 77; 42 & 43 Vict. c. 78; Ord. LXI. r. 9.

was enjoyed by the eldest son, as heir to his father, in those days when estates tail could not be barred. Primogeniture, as a custom, has been the subject of much remark (i). Where family honours or family estates are to be preserved, some such device appears necessary. But, in other cases, strict settlements of the kind referred to seem fitted rather to maintain the posthumous pride of present owners, than the welfare of future generations. The policy of the law is now in favour of the free disposition of all kinds of property; and as it allows estates tail to be barred, so it will not permit the object of an entail to be accomplished by other means, any further than can be done by giving estates to the unborn children of *living persons*. Thus an estate given to the children of an *unborn child* would be absolutely void (j). The desire of individuals to keep up their name and memory has often been opposed to this rule of law, and many shifts and devices have from time to time been tried to keep up a perpetual entail, or something that might answer the same end (k). But such contrivances have invariably been defeated; and no plan can be now adopted by which lands can with certainty be tied up, or fixed as to their future destination, for a longer period than the lives of existing persons and a term of twenty-one years after their decease (l).

A perpetuity.

✓ When the estate tail is preceded by a life interest.

Whenever an estate tail is not an estate in possession, but is preceded by a life interest to be enjoyed by

(i) See 2 Adam Smith's *Wealth of Nations*, 181, M'Culloch's edition; and M'Culloch's n. xix., vol. 4, p. 441. See also *Traité de Législation Civile et Pénale*, ouvrage extrait des Manuscrits de Bentham, par Dumont, tom. 1, p. 807.

(j) *Hay v. Earl of Coventry*, 8 T. Rep. 86; *Brudenell v. Elwes*,

1 East. 452; *Whitby v. Mitchell*, 44 Ch. D. 85.

(k) See *Fearne's Contingent Remainders*, 253 *et seq.*; *Moinwaring v. Baxter*, 5 Ves. 458.

(l) *Fearne's Contingent Remainders*, 430 *et seq.* The period of gestation is also included, if gestation exist; *Cadell v. Palmer*, 7 Bligh, N. B. 202.

some other person prior to the possession of the lands by the tenant in tail, the power of such tenant in tail to acquire an estate in fee simple in remainder expectant on the decease of the tenant for life is subject to some limitation. In the time when an estate tail, together with the reversion, could only be barred by a recovery, it was absolutely necessary that the first tenant for life, who had the possession of the lands, should concur in the proceedings; for no recovery could be suffered, unless on a feigned action brought against the tenant seized of the freehold (*m*). This technical rule of law was also a valuable check on the tenant in tail under every ordinary settlement of landed property; for, when the eldest son (who, as we have seen, is usually made tenant in tail) came of age, he found that, before he could acquire the dominion expectant on the decease of his father, the tenant for life, he must obtain from his father consent for the purpose. Opportunity was thus given for providing that no ill use should be made of the property (*n*). When recoveries were abolished, the consent formerly required was accordingly still preserved, with some little modification. The Act abolishing recoveries has established the office of *protector*, which almost always exists during the continuance of such estates under the settlement as may precede an estate tail. And the consent of the protector is required to be given, either by the same deed by which the entail is barred, or by a separate deed, to be executed on or before the day of the execution of the former, and to be also inrolled in the Central Office of the Supreme Court at or previously to the time of the enrolment of the deed which bars the entail (*o*). Without such consent the remainders and

The concurrence of the first tenant for life required. ✓

Protector.

His consent required to bar remainders and reversions.

(*m*) Cruise on Recoveries, 21. See, however, stat. 14 Geo. II. c. 20.

(*n*) See First Report of Real Property Commissioners, p. 32.

W.R.P.

(*o*) Stats. 3 & 4 Will. IV. c. 74, ss. 42—47; 36 & 37 Vict. c. 66, ss. 16, 77; 42 & 43 Vict. c. 78; Rules of the Supreme Court, 1883, Ord. LXI. r. 9.

reversion cannot be barred (*p*). In ordinary cases the protector is the first tenant for life under the settlement, in analogy to the old law (*q*); but a power is given by the Act, to any person entailing lands, to appoint, in the place of the tenant for life, any number of persons, not exceeding three, to be together protector of the settlement during the continuance of the preceding estates (*r*); and, in such a case, the consent of such persons only need be obtained in order to effect a complete bar to the estate tail, and the remainders and reversion. The protector is under no restraint in giving or withholding his consent, but is left entirely to his own discretion (*s*). If he should refuse to consent, the tenant in tail may still bar his own issue; as he might have done before the Act by levying a fine; but he cannot bar estates in remainder or reversion. The consequence of such a limited bar is, that the tenant acquires a disposable estate in the land for so long as he has any issue or descendants living, and no longer; that is, so long as the estate tail would have lasted had no bar been placed on it. This is called a base fee. But, when his issue fail, the persons having estates in remainder or reversion become entitled. When the estate tail is in possession, that is, when there is no previous estate for life or otherwise, there can very seldom be any protector (*t*), and the tenant in tail may, at any time by deed duly inrolled, bar the entail, remainders and reversion, at his own pleasure. And where a previous estate for life exists, it does not confer the office of protector, unless it be created by the same settlement which created the estate tail; so that a tenant in tail in remainder expectant on an estate for life, created by some prior deed or will, may bar the entail, remainders

The issue may be barred without protector's consent.

Base fee.

Estate tail in possession.

Life estate under prior deed or will.

(*p*) Stat. 3 & 4 Will. IV. c. 74,
ss. 84, 85.

(*q*) Sect. 22.
(*r*) Sect. 32.

(*s*) Sects. 36, 37.

(*t*) See Sugd. Vend. & Pur. 593,
11th ed.

and reversion, without the consent of the tenant for life under such prior deed or will (u).

The above-mentioned right of a tenant in tail to bar the entail is subject to a few exceptions; which, though of not very frequent occurrence, it may be as well to mention. And, first, estates tail granted by the Crown as the reward for public services cannot be barred so long as the reversion continues in the Crown. This restriction was imposed by an Act of Parliament of the reign of Henry VIII. (v), and it has been continued by the Act by which fines and recoveries were abolished (x). There are also some cases in which entails have been created by particular Acts of Parliament, and cannot be barred.

Again, an estate tail cannot be barred by any person who is *tenant in tail after possibility of issue extinct*. This can only happen where a person is tenant in *special* tail. For instance, if an estate be given to a man and the heirs of his body by his present wife; in this case, if the wife should die without issue, he would become tenant in tail after possibility of issue extinct (y); the possibility of his having issue who could inherit the estate tail would have become extinct on the death of his wife. A tenancy of this kind can never arise in an ordinary estate in tail *general* or *tail male*; for, so long as a person lives, the law considers that the possibility of issue continues, however improbable it may be from the great age of the party (z). Tenants in tail after possibility of issue extinct were prohibited from suffering common recoveries by a statute of the

Estate tail granted by the Crown as the reward of public services.

Tenant in tail after possibility of issue extinct.

p 84

(u) *Berrington v. Scott*, Exch. 18th January, 1875; 32 L. T., N. S. 125.

(v) Stat. 34 & 35 Hen. VIII. c. 20; *Cruise on Recoveries*, 318.

(z) Stat. 3 & 4 Will. IV. c. 74, s. 18; *Duke of Grafton's case*, 5

New Cases, 27.

(y) Litt. ss. 32, 33; 2 Black. Comm. 124.

(z) Litt. s. 34; Co. Litt. 40 a; 2 Black. Comm. 125; *Jee v. Audley*, 1 Cox, 324.

reign of Elizabeth (*a*), and a similar prohibition is contained in the Act for the Abolition of Fines and Recoveries (*b*). But, as we have before remarked (*c*), tenancies in special tail are not now common. In modern times, when it is intended to make a provision for the children of a particular marriage, estates are given directly to the unborn children, which take effect as they come into existence: whereas in ancient times, as we shall hereafter see (*d*), it was not lawful to give any estate directly to an unborn child.

Tenant in tail
ex provisione
viri.

The last exception is one that can only arise in the case of grants and settlements made before the passing of the Act for the Abolition of Fines and Recoveries; for the future it has been abolished. It relates to women who are tenants in tail of lands of their husbands, or lands given by any of his ancestors. After the decease of the husband, a woman so tenant in tail *ex provisione viri* was prohibited by an old statute (*e*) from suffering a recovery without the assent, recorded or inrolled, of the heirs next inheritable to her, or of him or them that next after her death should have an estate of inheritance (that is, in tail or in fee simple), in the lands: she was also prohibited from levying a fine under the same circumstances by the statute which confirmed to fines their force in other cases (*f*). This kind of tenancy in tail very rarely occurs in modern practice, having been superseded by the settlements now usually made on the unborn children of the marriage.

An estate tail
cannot be
barred by will
or contract.

It is important to observe that an estate tail can only be barred by an actual conveyance by deed, duly inrolled according to the Act of Parliament by which a

(*a*) 14 Eliz. c. 8.

(*b*) 8 & 4 Will. IV. c. 74, s. 18.

(*c*) *Ante*, p. 85.

(*d*) See the Chapter on a Con-

tingent Remainder.

(*e*) 11 Hen. VII. c. 20.

(*f*) Stat. 32 Hen. VIII. c. 36,

s. 2.

deed was substituted for a common recovery or fine (*h*). Thus every attempt by a tenant in tail to leave the lands entailed by his will (*i*), and every contract to sell them, not completed in his lifetime by the proper bar (*k*), will be null and void as against his issue claiming under the entail, or as against the remaindermen or reversioners (that is, the owners of estates in remainder or reversion), should there be no such issue left.

We see then that the most important right of alienation enjoyed by a tenant in tail is his power to bar the entail by deed inrolled, and so acquire the fee simple with all its attendant advantages (*l*). A tenant in tail, as such, has however certain limited powers of alienation, which he may exercise without barring the entail. By the common law, any disposition of his lands made by a tenant in tail will hold good during his life (*m*). And he is by statute (*n*) empowered to make certain dispositions which will bind his issue, as well as the reversioners or remaindermen. The Act for the Abolition of Fines and Recoveries empowers every tenant in tail in possession to make leases by deed, without the necessity of inrolment, for any term not exceeding twenty-one years, to commence from the date of the lease, or from any time not exceeding twelve calendar months from the date of the lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack-rent (*o*), or not less than five sixth parts

Powers of
alienation
exercisable
without
barring the
entail.

(*h*) *Peacock v. Eastland*, L. R., 10 Eq. 17.

(*i*) Cro. Eliz. 805; Co. Litt. 111 a; stat. 3 & 4 Will. IV. c. 74, s. 40.

(*k*) Bac. Abr. tit. Estate in Tail (D); stat. 3 & 4 Will. IV. c. 74, s. 40.

(*l*) *Ante*, pp. 62, 85, 98.

(*m*) Lit. ss. 595—600, 606—608, 649, 650.

(*n*) Stat. 32 Hen. VIII, c. 28, repealed by stat. 19 & 20 Vict. c. 120, s. 85, gave to tenants in tail a limited power to make leases binding on their issue only; see Co. Litt. 44 a, 45 b; 2 Black. Comm. 319; Bac. Abr. Leases and Terms for Years (D) 2.

(*o*) "Rack-rent is only a rent of the full value of the tenement, or near it"; 2 Black. Comm. 48.

of a rack-rent (*p*). And under the Settled Estates Act, 1877 (*q*), a tenant in tail in possession has the same power of leasing as is thereby given to a tenant for life. The Settled Land Act, 1882 (*r*), now gives the powers of a tenant for life under that Act to each of the following persons, when his estate or interest is in possession :—

(a) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown (*s*), and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services ;

(b) A person entitled to a base fee (*t*), although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown ;

(c) A tenant in tail after possibility of issue extinct (*u*).

The effect of these provisions is that every tenant in tail in possession (with the exception above specified) may grant all such leases as a tenant for life may grant under the Settled Land Act, 1882, and also may sell or exchange his land under that Act without the necessity of barring the entail. But in such cases the proceeds of a sale, and any capital money arising upon the grant of a lease, and any land taken in exchange, will become subject to the entail. Leases and sales under the Settled Land Act will be explained in the next chapter.

Sale and
exchange.

(*p*) Stat. 3 & 4 Will. IV. c. 74, ss. 16, 40, 41.

(*q*) Stat. 40 & 41 Vict. c. 18, s. 46, replacing stat. 19 & 20 Vict. c. 120, ss. 32, 33. See stat. 53 Vict. c. 5, s. 122, as to leases of the lauds of a lunatic tenant in tail.

(*r*) Stat. 45 & 46 Vict. c. 38, s. 58, sub-s. 1 (i.), (iii.), (vii.); Williams's Conveyancing Statutes, 861—864.

(*s*) See *ante*, p. 99.

(*t*) *Ante*, p. 98.

(*u*) *Ante*, p. 99.

As regards the right of free enjoyment, a tenant Free in tail is on an equal footing with a tenant in fee enjoyment. simple (x); he may cut down timber for his own benefit, and commit what waste he pleases, without the necessity of barring the entail for the purpose (y). Waste.

If a tenant in fee simple make a gift of his lands for an estate tail, a tenure will still be created between donor and donee; for the statute of *Quia Emptores* only prohibits subinfeudation upon gifts of land in fee simple (z). And upon the creation of such a tenure, any services or rent might be reserved (a). But as estates tail have from the earliest times been chiefly used for the purpose of family settlement (b), it has long been unusual specially to subject tenants in tail to performance of service or payment of rent. If no services were specially reserved on a gift in tail the donee held of the donor by the same services as the latter held of his superior lord, except in the case of a gift in frank-marriage (c). Thus in the days of military tenures, tenants in tail might be subject to homage, aids, and the lord's rights of wardship and marriage, as well as tenants in fee simple (d). These burdens were abolished in 1645, as we have seen (e). An oath of fealty is however still incident to the tenure of an estate Fealty. tail: but, as in other cases, it is never exacted (f).

It has been observed that, in ancient times, estates Forfeiture for treason. tail were not subject to forfeiture for high treason beyond the life of the tenant in tail (g). This privilege they

(x) *Ante*, p. 75.

(y) Co. Litt. 224 a; 2 Black. Comm. 115; Ca. t. Talb. 16; 3 Madd. 531; Joh. 752.

(z) Stat. 18 Edw. I. c. 1, *ante*, p. 88; Kitchen on Courts, 410, Watk. Desc. p. 4, n. (m), pp. 11, 12, 4th ed.

(a) Co. Litt. 23 a.

(b) *Ante*, p. 64, 86, 95.

(c) Litt. s. 19; see *ante*, p. 64.

(d) Litt. ss. 90, 103; Co. Litt. 23 a, 76 a b, 77 a; 8 Rep. 166; *ante*, pp. 44, 45.

(e) *Ante*, p. 51.

(f) Litt. s. 91; Co. Litt. 67 b, 68 b, n. (5).

(g) *Ante*, p. 88.

Attainder.

were deprived of by an Act of Henry VIII. (*h*), by which all estates of inheritance (under which general words estates tail were covertly included) were declared to be forfeited to the king upon any conviction of high treason (*i*). The attainder (*k*) of the ancestor did not of itself prevent the descent of an estate tail to his issue, as they claimed from the original donor *per formam doni* (*l*); and, therefore, on attainder for felony (other than treason), an estate tail still descended to the issue. As we have seen (*m*), forfeiture for treason and attainder were abolished in 1870.

Husband and wife.

In addition to the liabilities above mentioned are the rights which the marriage of a tenant in tail confers on the wife, if the tenant be a man, or on the husband, if the tenant be a woman; an account of which will be contained in a future chapter on the relation of husband and wife. But, subject to these rights and liabilities, an estate tail, if not duly barred, will descend to the issue of the donee in due course of law; all of whom will be necessarily tenants in tail, and will enjoy the same powers of disposition as their ancestor, the original donee in tail. The course of descent of an estate tail is similar, so far as it goes, to that of an estate in fee simple, an explanation of which the reader will find in the ninth chapter.

Descent of an estate tail.

(*h*) Stat. 26 Hen. VIII. c. 18, s. 5; see also 5 & 6 Edw. VI. c. 11, s. 9.

(*i*) 2 Black. Comm. 118.

(*k*) *Ante*, p. 46.

(*l*) 3 Rep. 10; 8 Rep. 165 b; Cro. Eliz. 28; 4 Black. Comm. 385.

(*m*) *Ante*, p. 52.

CHAPTER IV.

OF AN ESTATE FOR LIFE.

HAVING examined freehold estates of inheritance in fee simple and fee tail, let us proceed to consider freehold estates not of inheritance (*a*), the chief of which is an estate for life. This gives the tenant the right to hold the lands during his life: but his interest therein ceases at his death, and does not pass to his heirs or other representatives. In connection with the gift of a life estate, we may notice an ancient rule of law, which has come down to us from Bracton's day, that if a grant of land be made to a man, without further words expressly conferring on him an estate transmissible to his heirs, he takes an estate for life only (*b*). At the present day we are so used to the transmission of the rights arising from act or agreement between one man and another, that we are apt to regard as exceptional any case, in which the legal relations so created are not extended to the parties' representatives after their death. But in the days of the early common law it was rather presumed that the legal relations, into which men entered by their own act, were personal to themselves, unless the contrary were expressed (*c*). In those days, moreover, when subinfeudation prevailed (*d*), gifts

A grant to A. B. simply confers only a life estate.

(*a*) *Ante*, p. 60.

(*b*) Bract. fo. 27 a, 92 b, 263 a; Bracton's Note Book, cases 1235, 1811; Fleta, fo. 198; Litt. ss. 1, 288; Co. Litt. 42 a; 2 Black. Comm. 121; *Lucas v. Branderth*, 28 Beav. 274.

(*c*) See Bract. fo. 26 b, 101 a,

170 a b, 192 b, 194 b, 199 a, 218 b, 268 b. Compare the early conception of contract and wrong as matters personal to those between whom the obligation was created; Williams on Personal Property, 10 and note (*l*), 18th ed.

(*d*) *Ante*, p. 37.

of land were not interpreted (e) upon the principle subsequently established, that every grant is to be construed most strongly against the grantor (f). And I do not suppose that it shocked the common sense of Bracton's time (g), that a gift of land to one by name would give him the land as long as he could live to enjoy it; but would give him no fee (h), unless it were expressed that his heirs should succeed him.

This rule
often defeated
testator's
intentions.

However reasonable such a construction may have been when gifts of land were rarely made by a transfer of the donor's whole interest (i), the rule in question had ceased to accord with the common sense of laymen, by the time that an estate in fee simple had become practically equivalent to absolute ownership (k). Nevertheless the rule remained a dry technicality embedded in the law. Its most remarkable effect was its frequent defeat of the intentions of unlearned testators (l), who, in leaving their lands and houses to the objects of their bounty, were seldom aware that they were conferring only a life interest; though if they extended the gift to the heirs of the parties, or happened to make use of the word *estate*, or some other such technical term, their gift or devise included the whole extent of the interest they had power to dispose of. "Generally speaking," said Lord Mansfield (m), "no common person has the

(e) See Bract. fo. 48 a.
(f) Co. Litt. 86 a, 48 a; Shep. Touch. 88; *Doe d. Davies v. Williams*, 1 H. Black. 25; Broom's Legal Maxims, 594, 5th ed.

(g) If it had, I think Bracton would probably have said so. Any one who reads Bracton's remarks (fo. 440 b) on the hardship of the impossibility of obtaining final judgment in default of appearance in a personal action (a hardship first removed in 1832, see Williams on Personal Property, 4, n. (k),

18th ed.), must be convinced that he was no pedant of the dark ages, but an enlightened critic of the law, who could appreciate the harshness of a technical rule, and, what is more, suggest a sound reform.

(h) *Ante*, p. 18.

(i) *Ante*, p. 37.

(k) *Ante*, pp. 26, 62.

(l) 2 Jarman on Wills, 267, 4th ed., and the cases there cited.

(m) In *Hogan v. Jackson*, Cowp. 306.

smallest idea of any difference between giving a horse and a quantity of land. Common sense alone would never teach a man the difference; but the distinction, which is now clearly established, is this:—If the words of the testator denote only a *description* of the *specific estate* or *land* devised, in that case, if no words of limitation are added, the devisee has only an estate for *life*. But if the words denote the *quantum* of *interest* or property that the testator has in the lands devised, then the *whole* extent of such his *interest* passes by the gift to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator.” Such questions, as may be imagined, were sufficiently numerous, till at length a statutory remedy was applied. And now, in wills made after the year 1837, a devise of real estate without any words of limitation (*n*) shall be construed to pass the fee simple, or other the whole estate or interest, of which the testator had power to dispose, unless a contrary intention shall appear (*o*). But the old rule is still in force with regard to deeds (*p*). To confer a life estate, however, it is usual and proper to limit the lands to the grantee “during his life” (*q*).

If a tenant in fee simple grant land to another for life, a tenure will be created between the parties, as in the case of a gift in tail (*r*); and on such a grant any rent or services may be reserved (*s*). In early times after the Conquest life estates seem chiefly to have arisen under leases at money rents, mostly granted by ecclesiastical corporations of church lands (*t*). At the

(*n*) *i. e.* words used to *limit* or mark out the estate conferred.

(*o*) Stat. 7 Will. IV. and 1 Vict. c. 26, ss. 28, 24.

(*p*) See Elphinstone, Norton and Clark on the Interpretation of Deeds, rule 116, p. 295.

(*q*) Davidson, Prec. Conv. vol.

iii. part ii. p. 984, 3rd ed.

(*r*) *Ante*, p. 108.

(*s*) Litt. ss. 56, 57, 182, 214, 215; Gilb. Tenures, 90.

(*t*) Madox, Form. Angl. Nos. 195 *et seq.*; Domesday of St. Paul's (Camden Society), xc. 122 *et seq.*; Gloucester Cartulary (Rolls series),

- present day farming leases are seldom granted for life or lives. Life estates, however, are very common interests in land. But they now almost always arise under the modern system of settlement, which has prevailed since the time of the Commonwealth (*u*); and in which, as we have seen (*x*), a life estate is given to a husband on his marriage, or to an eldest son coming of age, after whose death the lands are limited to his unborn children for successive estates tail. When life estates are so created no rent is reserved. And though an oath of fealty is incident to a life as to every other freehold estate, it has long been practically obsolete (*y*).
- Fealty.**
- Civil death.** Every life estate may be determined by the civil death of the party, as well as by his natural death; for which reason in old conveyances the grant was usually made for the term of a man's natural life (*z*). Formerly a person by entering a monastery, and being professed in religion, became dead in law (*a*). But this doctrine is now inapplicable; for there is no longer any legal establishment for professed persons in England (*b*) and our law never took notice of foreign professions (*c*). Civil death may, however, occur by outlawry (*d*), which may still take place in criminal proceedings, though in civil proceedings it is now abolished (*e*). Civil death was formerly occasioned also by attainder for treason or felony; but all attainders are now abolished (*f*).
- Natural life.**

Nos. 20, 23, 31, 44, and others; Vinogradoff, Villainage in England, 330, 331.

(*u*) See Papers read before the Juridical Society, vol. i. p. 45 (a paper written by the late author).

(*x*) *Ante*, p. 95.

(*y*) Litt. s. 132; Co. Litt. 67 b, 68 b, n. (5).

(*z*) Co. Litt. 132 a; 2 Black. Comm. 121.

(*a*) 1 Black. Comm. 132.

(*b*) Co. Litt. 3 b, n. (7), 132 b, n. (1); 1 Black. Comm. 132; stat. 31 Geo. III. c. 32, s. 17; 10 Geo.

IV. c. 7, ss. 23—27; 2 & 3 Will. IV. c. 115, s. 4. See also Anstey's Guide to the Laws affecting Roman Catholics, pp. 24—27; 23 & 24 Vict. c. 134, a. 7; *Re Metcalfe's Trusts*, 2 DeG. J. & S. 122.

(*c*) Co. Litt. 132 b.

(*d*) 4 Black. Comm. 319, 330; Watk. n. 123 to Gilb. Ten.; *ante*, p. 46.

(*e*) By stat. 42 & 43 Vict. c. 59, s. 8.

(*f*) By stat. 33 & 34 Vict. c. 23; *ante*, p. 52.

With regard to the right of free enjoyment the position of a tenant for life is very different from that of tenant in fee simple or in tail (*g*). Every tenant for life, unless restrained by covenant or agreement, has indeed the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house, and the hedges and fences (*h*), and also the right to cut underwood and lop pollards in due course (*i*).

Restricted enjoyment of tenant for life.

But he is not allowed to commit any kind of *waste* by voluntary destruction of any part of the premises, which is called voluntary waste (*k*). Thus he may not cut timber (*l*), or plough up ancient meadow land (*m*); and he is not allowed to dig for gravel, brick-earth or stone, except in such pits or places as were open and usually dug when he came in (*n*); nor can he open new mines for coal or other minerals, nor cut turf for sale on bog lands; for all such acts would be acts of voluntary waste. But to continue the working of existing mines, or to cut turf for sale in bogs already used for that purpose, is not waste; and the tenant may accordingly carry on such mines and cut turf in such bogs for his own profit (*o*). And it has been lately held that it is not waste for a tenant for life to fell timber according to the usual course of management of woods, which his predecessors had cultivated for periodical croppings;

Waste.

(*g*) *Ante*, p. 75.

(*h*) Co. Litt. 41 b; 2 Black. Com. 85, 122.

(*i*) *Phillips v. Smith*, 14 M. & W. 589. As to thinnings of young timber, see *Pidgeley v. Rawling*, 2 Coll. 275; *Bagot v. Bagot*, 32 Beav. 509, 518; *Earl Cowley v. Wellesley*, L. R. 1 Eq. 656; 35 Beav. 635; *Honywood v. Honywood*, L. R., 18 Eq., 306, 307, 308; *Dashwood v. Magniac*, 1891, 3 Ch. 306, 329, 330, 377-380.

(*k*) Co. Litt. 58 a; *Whitfield v. Bewit*, 2 P. Wms. 241; 2 Black.

Comm. 122, 281; 3 Black. Comm. 224.

(*l*) *Honywood v. Honywood*, L. R., 18 Eq., 306; *Dashwood v. Magniac*, 1891, 3 Ch. 306.

(*m*) *Simmons v. Norton*, 7 Bing. 648. See *Duke of St. Albans v. Skipwith*, 8 Beav. 354.

(*n*) Co. Litt. 58 b, *Viner v. Vaughan*, 2 Beav. 466; *Elias v. Snowden Slate Quarries Company*, 4 App. Cas. 454.

(*o*) Co. Litt. 54 b; *Coppinger v. Gubbins*, 3 Jones and Lat. 397.

Writ of waste
abolished.

Permissive
waste.

and he is entitled to the profits of timber so cut (*p*). By an old statute (*q*), the committing of any act of waste was a cause of forfeiture of the thing or place wasted, in case a *writ of waste* were issued against the tenant for life. But this writ is now abolished (*r*); and a tenant for life is now liable only to damages in an action (*s*) for waste already done, or to be restrained by injunction from cutting the timber or committing any other act of waste which he may be known to contemplate (*t*). It was formerly a question whether a tenant for life were not liable for *permissive*, as well as voluntary waste; that is, for permitting the buildings to go to ruin; but it has been lately held that he is not (*u*), unless the duty of repair be expressly laid on him by his grantor (*x*). If any timber on the land of a tenant for life were in such an advanced state that it would take injury by standing, he might obtain an order of the Court of Chancery allowing it to be cut; when the profits would be invested for the benefit of the persons entitled on the expiration of the life estate, and the interest paid to the tenant during his life (*y*). And the Settled Estates Acts, 1856 and 1877 (*z*), empowered the Court to authorise a sale of any timber, not being ornamental timber, growing on any settled estates. And now by the Settled Land Act, 1882 (*a*), where a

(*p*) *Dashwood v. Magniac*, 1891, 3 Ch. 306 (Lindley and Bowen, L.-JJ., affirming Chitty, J., *diss.* Kay, L.-J.)

(*q*) The Statute of Gloucester, 6 Edw. I. c. 5; 2 Black. Com. 283; Co. Litt. 218 b, n. (2).

(*r*) By stat. 3 & 4 Will. IV. c. 27, s. 36.

(*s*) 2 Wms. Saund. 252, n. (7); 3 Steph. Comm. 532, 6th ed. 442, 11th ed.

(*t*) See Seton on Decrees, 185, 190, 1259, 1265, 4th ed.

(*u*) *Re Cartwright*, 41 Ch. D. 582; see the cases there cited.

(*x*) *Woodhouse v. Walker*, 5 Q. B. D. 404; *Dashwood v. Mag-*

nac, 1891, 3 Ch. 306, 339.

(*y*) *Tooker v. Annesley*, 5 Sim. 235; *Waldo v. Waldo*, 7 Sim. 281; 12 Sim. 107; *Tollemache v. Tollemache*, 1 Hare, 456; *Consell v. Bell*, 1 You. and Coll. New cases, 569; *Gent v. Harrison*, Johnson, 517; *Honywood v. Honywood*, L.R., 18 Eq. 306; *Loundes v. Norton*, 6 Ch. D. 139. See Williams's Conveyancing Stats., 337.

(*z*) Stats. 19 & 20 Vict. c. 120, s. 11; 40 & 41 Vict. c. 18, s. 16.

(*a*) Stat. 45 & 46 Vict. c. 38, s. 85, sub-s. 1; see Williams's Conveyancing Statutes, 337.

tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof. In such a case, three fourth parts of the net proceeds of the sale must be set aside and applied as capital money arising under that Act, and the other fourth part will go as rents and profits (b).

If, however, the estate is given to the tenant by a written instrument (c) expressly declaring his estate to be *without impeachment of waste*, he is allowed to cut timber in a husbandlike manner for his own benefit, to open mines, and commit other acts of waste with impunity (d); but so that he do not pull down or deface the family mansion, or fell timber planted or left standing for ornament, or commit other injuries of the like nature; all of which are termed *equitable waste*; for the Court of Chancery, administering *equity*, restrained such proceedings (e). And now by a provision of the Judicature Act of 1873, which united the old superior courts of law and equity (f), a tenant for life without impeachment of waste has no legal right to commit equitable waste, unless an intention, to confer such a right expressly appears by the instrument creating his estate (g).

(b) Sect. 35, sub-s. 2; see sects. 2 (9), 21; Williams's Conveyancing Statutes, 292, 325, 337.

(c) *Dowman's case*, 9 Rep. 10 b.

(d) *Lewis Bowles' case*, 11 Rep. 32 b; 2 Black. Comm. 283; *Burges v. Lamb*, 16 Ves. 185; *Cholmeley v. Paxton*, 8 Bing. 211; 10 B. & C. 564; *Davies v. Wescomb*, 2 Sim. 425; *Woolf v. Hill*, 2 Swanst. 149; *Waldo v. Waldo*, 12 Sim. 107; *Re Barrington*, 83 Ch. D. 523.

(e) 1 Fonb. Eq. 38 n.; *Marquis of Downshire v. Lady Sandys*, 6

Ves. 107; *Burges v. Lamb*, 16 Ves. 183; *Day v. Merry*, 16 Ves. 375 a; *Wellesley v. Wellesley*, 6 Sim. 497; *Duke of Leeds v. Earl Amherst*, 2 Phil. 117; *Morris v. Morris*, 15 Sim. 505; 8 De G. & J. 323; *Micklethwait v. Micklethwait*, 1 De G. & J. 504; *Baker v. Sebright*, 13 Ch. D. 179.

(f) Stats. 36 & 37 Vict. c. 66; 37 & 38 Vict. c. 83. As to equity and the Court of Chancery, see *post*, ch. vii.

(g) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. (3).

Right of
alienation of
tenant for
life.

Powers of
tenant for
life.

A tenant for life may grant over the land he holds for so long as he shall live: but he could not by the common law make any lawful disposition to endure for a longer period (*h*). And his common law right of alienation is still all that he can exercise for his own exclusive profit. But at the present day a tenant for life has large *powers* of disposing of the land he holds, for the benefit of those entitled thereto after his death, as well as himself. Powers are means of conveying land independently of the right of alienation incident to the estate in the land. Under the modern system of settling land on one for life, and then on his sons successively in tail (*i*), no valid disposition of the land could be made by virtue of the estates so created, except for the father's lifetime, until a son attained twenty-one; when he could join in barring the entail (*k*). This was obviously inconvenient; and it therefore became usual to give to the tenant for life under a settlement powers of leasing the settled land for certain terms on specified conditions; and leases granted under such powers remained good after his death, for the benefit of his successors under the settlement. It was also usual for settlements to contain powers enabling trustees to sell the settled lands and convey them to purchasers; and with the purchase money to buy other lands to be made subject to the settlement. The exact operation of these powers will be explained in a subsequent part of the book (*l*). For the present it will be enough to say that the devices of modern conveyancers had made it possible for a tenant in fee simple, not only to grant his land to another in fee simple, or for any less estate (*m*), with the rights of alienation incident to the estate conferred, but also to give to others independent

(*h*) Bract. fo. 11 b, 18 b, 318 a, 323 b, 324 a; Litt. ss. 415, 416, 609—611; Co. Litt. 251 b.

(*i*) *Ante*, pp. 95, 108.

(*k*) *Ante*, p. 95.

(*l*) *Post*, part ii. ch. iii.

(*m*) *Ante*, pp. 62, 70.

powers of disposition over his land, equivalent to the disposing power of a tenant in fee simple. Such powers are known as powers of appointment. They could only arise, in the case of settled land, by express provision of the parties making the settlement (*n*), who having the whole fee simple to dispose of, were in a position to create powers over as well as estates in the land. But now, the Settled Land Act, 1882 (*o*) gives to every tenant for life in possession of land under a settlement, large powers of leasing and also a power of selling or exchanging the settled land. Since these extensive statutory powers have been conferred on a tenant for life, it has been no longer usual to insert in settlements the old express powers of appointment, which were formerly used to effect the same objects. Statutory powers resemble express powers in affording means of conveying the settled land, independently of the right of alienation incident to any estate therein. But their operation does not rest on the same conveying device; as they derive their effect from the supreme authority of the statute, which enables the tenant for life lawfully to convey away what, in fact, is not his own.

(*n*) Powers of leasing appear to date from the beginning of the modern system of settlement; and the practice of inserting a power of sale in settlements seems to have grown up during the eighteenth century; see Butler's note (v. 4, 5) to Co. Litt. 290 b; Bridgman's Precedents in Conveyancing (3rd ed. A. D. 1699), pp. 130, 148, 171, 332; Lilley's Practical Conveyancer (1719), p. 568; 2 Horsman's Conveyancing (1744), pp. 217, 475; 3 Wood's Conveyancing (3rd ed. by Powell, 1793), p. 641; 7 Barton's Conveyancing (3rd ed. 1824), p. 248; 3 Davidson's Prec. Conv. (3rd ed. 1873), pp. 263—269, 479, 556.

(*o*) Stat. 45 & 46 Vict. c. 38;

see s. 2, sub-ss. 1, 5. The Settled Estates Act, 1877 (stat. 40 & 41 Vict. c. 18), which replaced an Act of 1856, empowers tenants for life under settlements made after the 1st of November, 1856, to make ordinary leases for twenty-one years in England, and thirty-five in Ireland, of any part of their settled estates, except the principal mansion-house and lands usually occupied therewith, at the best rent without fine. Agricultural, mining, building and other leases, and sales of settled estates may also be made under the same Act on application to the Chancery Division of the Court, whatever be the date of the settlement.

Scheme of the
Settled Land
Act, 1882.

The scheme of the Settled Land Act, 1882 (*p*), is to entrust the tenant for life with wide powers of disposition exercisable by him for the benefit of all parties entitled under the settlement (*q*), but to impose such conditions on the exercise of these powers as shall prevent his dealing with the land for his own profit at the expense of his successor's interests. In particular the Act does not permit him to receive any capital money arising under the Act, but directs its payment to trustees of the settlement for the purposes of the Act (*r*), or into court (*s*). Thus the Act empowers (*t*) a tenant for life to lease the settled land for any purpose whatever, whether involving waste (*u*) or not, for any term not exceeding (i.) in case of a building lease, ninety-nine years; (ii.) in case of a mining lease, sixty years; (iii.) in case of any other lease, twenty-one years in England or Wales (*x*) and thirty-five years in Ireland (*y*). But the principal mansion-house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith cannot be leased under this Act without the consent of the trustees of the settlement or an order of the Court: though this restriction does not apply where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent (*z*). Every lease intended to take effect under this Act must be made strictly in accordance with the conditions imposed by the Act. Thus a tenant for life intending to make a lease under this Act, must in general give due

Notice to
trustees.

(*p*) Stat. 45 & 46 Vict. c. 38.

(*q*) Sect. 58.

(*r*) See sects. 2 (sub-s. 8), 38, 39; stat. 53 & 54 Vict. c. 69, s. 16.

(*s*) Stat. 45 & 46 Vict. c. 38, s. 22.

(*t*) Sect. 6.

(*u*) *Ante*, p. 109.

(*x*) See s. 1, sub-s. 8; Williams's Conveyancing Statutes, 291, 299.

(*y*) Sect. 65, sub-s. 10.

(*z*) Stat. 53 & 54 Vict. c. 69, s. 10, replacing 45 & 46 Vict. c. 38, s. 15.

notice of his intention to each of the trustees of the settlement and their solicitor, if known to the tenant for life (a). And every lease made under this Act must be by deed (b), and be made to take effect in possession not later than twelve months after its date (c); it must also reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case (d); and must in other respects conform with the requirements of the statute (e). But a lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life without giving any notice to the trustees; such a lease may, moreover, be made by writing under hand only, in cases where the term does not extend beyond three years from the date of the writing (f). Building and mining leases are subject to additional special regulations (g). A fine received on the grant of a lease under any power conferred by this Act must be applied as capital money arising under this Act (h). Under a mining lease made under this Act, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, part of the rent must be set aside and applied as capital money arising under this Act; namely,

Fines on
leases.

Rent on
mining lease.

(a) Stat. 45 & 46 Vict. c. 38, s. 45; Williams's Conveyancing Statutes, 344—347. See now stat. 47 & 48 Vict. c. 18, s. 5.

(b) *Ante*, p. 31.

(c) Stat. 45 & 46 Vict. c. 38, s. 7, sub-s. 1.

(d) Sect. 7, sub-s. 2.

(e) Every lease must contain a covenant for payment of rent, and a condition of re-entry on non-payment of rent within thirty

days at the outside; and a counter-part of every lease must be executed; sect. 7, sub-ss. 8, 4.

(f) Stat. 53 & 54 Vict. c. 69, s. 7.

(g) Stats. 45 & 46 Vict. c. 38, ss. 8—10; 53 & 54 Vict. c. 69, ss. 8, 9. See Williams's Conveyancing Statutes, 308—306.

(h) Stat. 47 and 48 Vict. c. 18, s. 4. See Williams's Conveyancing Statutes, 292, 302, 325.

where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof; and in every such case the residue of the rent will go as rents and profits (i). Powers additional to or larger than the powers conferred by this Act may be given to the tenant for life by the deed under which he holds (k); and settlements often contain some relaxation of the restrictions imposed by the Act (l). Any lease made by a tenant for life otherwise than in accordance with the conditions of the Act will be void as against his successors (m), though good for his own life.

Tenant for life's power of sale and exchange.

The Act also empowers a tenant for life to sell or exchange the whole or any part of the settled land (n). But exactly the same restriction is imposed on a sale as on a lease by the tenant for life of the principal mansion-house and lands usually occupied therewith (o). And due notice of intention to sell must be given to the trustees and their solicitor, as in the case of a lease (p). Every sale or exchange must be made at the best price or consideration that can reasonably be obtained (q). The proceeds of any sale made under the Act and any money agreed to be paid for equality of

(i) Stat. 45 & 46 Vict. c. 38, s. 11. See *ante*, pp. 109—111; Williams's Conveyancing Statutes, 307—309.

(k) See sect. 57.

(l) *E. g.*, as to the necessity of giving notice to the trustees, or of setting aside part of the rent on making a mining lease, see Williams's Conveyancing Statutes, 308, 345—347, 506, 528.

(m) See *Davis v. Davis*, 38 Ch. D. 499, decided on the Settled Estates Act, 1877. A lease made *bond fide* in intended exercise of the statutory power may, however, be good as a contract to grant a lease, and so be binding on the lessor's successors; *stat.*

12 & 13 Vict. c. 26, s. 2; 13 & 14 Vict. c. 17. See *stat.* 45 & 46 Vict. c. 38, s. 12; Williams's Conveyancing Statutes, 309.

(n) Stat. 45 & 46 Vict. c. 38, s. 3. See *Whelwright v. Walker*, 28 Ch. D. 752; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651.

(o) *Ante*, p. 114; see *Re Sabright's Settled Estates*, 33 Ch. D. 429; *Re Marquis of Ailesbury's Settled Estates*, 8 Times L. R. 157.

(p) *Ante*, p. 114; see *Duke of Marlborough v. Sartoris*, 32 Ch. D. 616; *Hatten v. Russell*, 38 Ch. D. 334.

(q) Stat. 45 & 46 Vict. c. 38, s. 4.

any exchange effected under the Act must be paid, not to the tenant for life, but to the trustees of the settlement or into Court, at his option; and will then be applicable by the trustees according to his direction, or under the direction of the Court, in any of the authorized modes of employment of capital money arising under the Act (r). These are stated in the note (s).

(r) Stat. 45 & 46 Vict. c. 38, s. 22.

(s) (Stat. 45 & 46 Vict. c. 38, s. 21). Capital money arising under Application of this act, subject to payment of claims properly payable thereout, and to capital money application thereof for any special authorized object for which the same arising under was raised, shall, when received, be invested or otherwise applied the Settled wholly in one, or partly in one, and partly in another or others of Land Act, 1882, the following modes (namely):

(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law (see stat. 52 & 53 Vict. c. 32) authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain and Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment in or for any other such securities:

(ii.) In discharge, purchase or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent charge in lieu of tithe, crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

(iii.) In payment for any improvement authorized by this Act (see stats. 46 & 47 Vict. c. 61, s. 29; 50 & 51 Vict. c. 80. *Re Lord Egmont's Settled Estates*, 45 Ch. D. 395):

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right or privilege convenient to be held with the settled land for mining or other purposes:

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge (see stat. 53 & 54 Vict. c. 69, s. 14).

(x.) In payment of costs, charges and expenses of or incidental to

They chiefly include investment in authorized securities, discharge of incumbrances affecting the whole estate in the settled land (*t*), payment for authorized improvements, and purchase of other lands to be made subject to the settlement. Any investment must be in the names or under the control of the trustees (*u*). Capital money arising under the Act is, while uninvested or invested in money securities, made subject to the settlement as effectually as if it were land, and will go to the persons to whom the land, from which it arises, would have gone for the same estates and interests as they would have had in the land; the income of invested capital being paid to the persons who would have been entitled to the income of the land (*x*).

+ Tenant for life's power of conveyance (*y*).

For the purpose of carrying into effect the powers of leasing, sale and other powers given by the Settled Land Act, the tenant for life is empowered to convey the settled land by deed for all the estate, which is the subject of the settlement, or for any less estate, as may be required (*z*). Such a deed will pass the land conveyed, discharged from the settlement, under which the

the exercise of any of the powers, or the execution of any of the provisions of this Act:

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

The Court may also order that the costs of legal proceedings taken for the protection of settled land be paid out of capital money raised by sale of part of the lands in settlement; *Re Earl De La Warr's Estates*, 16 Ch. D. 587; stat. 45 & 46 Vict. c. 38, ss. 36, 47.

(*t*) By stat. 53 & 54 Vict. c. 69, s. 11, a tenant for life has power to raise money on mortgage of the settled land for the purpose of discharging an incumbrance thereon, not being an annual sum payable during a life or lives, or during a term of years absolute or determinable.

(*u*) Stat. 45 & 46 Vict. c. 38, s. 22, sub-s. 2.

(*x*) Sect. 22, sub-ss. 5, 6.

(*y*) Stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 12; and 2 & 3 Vict. c. 60,

empowered tenants for life under wills to convey, under the direction of the Court of Chancery, the whole estate in their lands if a sale or mortgage thereof were directed for payment of the debts of the testator. These powers are now generally superseded by stats. 13 & 14 Vict. c. 60, s. 29; 15 & 16 Vict. c. 55, s. 1.

(*z*) See stats. 45 & 46 Vict. c. 38, s. 20, sub-s. 1; 53 & 54 Vict. c. 69, s. 6. Williams's Conveyancing Statutes, 321, 322.

tenant for life holds, and from all estates and interests subsisting or to arise thereunder: but will not displace or defeat (i.) any estates, interests or charges having *priority* to the settlement; (ii.) any other estates, interests or charges which have been conveyed or created *for securing money actually raised* at the date of the deed; or (iii.) any leases or grants made or agreed upon for value in money or its worth, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement or under any statutory power, or being otherwise binding on the successors in title of the tenant for life (a). Settlements are often made on one for life and others after him of land, which is subject to prior mortgages or rent-charges. It will be seen that such interests in the land cannot be defeated by a sale under the Act; nor other mortgages to secure money actually raised, including mortgages by the tenant for life of his life estate (b); nor leases granted under express or statutory powers. And if it be desired to sell the land freed from such interests, it will generally be necessary for the persons entitled thereto to concur in the sale.

The powers of a tenant for life under the Settled Land Act are not capable of assignment or release, do not pass to his assignee by operation of law or otherwise, and remain exercisable by him notwithstanding any assignment of his estate (c). But this is without prejudice to the rights of any assignee for value of the whole or any part of his estate; which cannot generally be affected without the assignee's consent (d). A con-

Statutory powers cannot be assigned.

(a) Sect. 20, sub-s. 2; see Williams's Conveyancing Statutes, 321, 322—325.

(b) See *Re Sebright's Settled Estates*, 38 Ch. D. 429, 438; *Cardigan v. Curzon-Howe*, 40 Ch. D.

328, 41 Ch. D. 375.

(c) Stat. 45 & 46 Vict. c. 38, s. 50, sub-s. 1.

(d) Sect. 50, sub-ss. 3, 4. Unless the assignee is actually in possession, his consent is not re-

tract by a tenant for life not to exercise any of his powers under the Act is void (*e*). And any provision in a settlement attempting to forbid a tenant for life to exercise any power under the Act is void (*f*). For further information respecting this very important statute, which must necessarily be studied by every intending practitioner, the reader is referred to the text of the Act itself, and to the notes thereto contained in the editor's "Conveyancing Statutes." The Act has been amended by Acts of 1884, 1887 and 1890 (*g*).

Improvement
of settled
land.

By several Acts of Parliament of the present reign (*h*), and especially by the Improvement of Land Act, 1864 (*i*), facilities have been given for borrowing money to be spent in making improvements on settled land by way of drainage and in a variety of other ways (*k*), and to be repaid with interest by equal instalments extending over a fixed term of years and charged as a rentcharge upon the inheritance of the land. The instalments are payable by a tenant for life during his lifetime; and he is bound to maintain the improvements made (*l*). By

* Railways or
Canals.

quisite to the making by the tenant for life of leases under the Act at the best rent without fine.

(*e*) Sect. 50, sub-s. 2.

(*f*) Sect. 51.

(*g*) Stats. 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 50; and 53 & 54 Vict. c. 69.

(*h*) Stats. 8 & 9 Vict. c. 56, replacing 3 & 4 Vict. c. 55; 9 & 10 Vict. c. 101, amended by 10 & 11 Vict. c. 11, 11 & 12 Vict. c. 119, 13 & 14 Vict. c. 81, and 19 & 20 Vict. c. 9, 12 & 13 Vict. c. 100, amended by 19 & 20 Vict. c. 9 and repealed by 27 & 28 Vict. c. 114.

(*i*) Stat. 27 & 28 Vict. c. 114.

(*k*) By stat. 45 & 46 Vict. c. 38, s. 30, the Act of 1864 is extended so as to comprise all improvements authorized by the Settled Land Act, 1882; see below, p. 121, n. (*g*). Settled lands may be charged under the Act of 1864 (ss. 78 &

seq.) with the repayment of money subscribed for the construction of railways or canals* on or near to them and likely to benefit them. Stats. 33 & 34 Vict. c. 56, and 34 & 35 Vict. c. 84, added to the list of improvements authorized by the Act of 1864 the erection, completion, or improvement of a mansion house suitable to the estate, as a residence† for its owner, provided that the sum charged for such purposes should not be more than two years' net rental of the whole estate. Stat. 40 & 41 Vict. c. 81 added the erection of reservoirs‡ and other permanent works for the supply of water, and empowered subscriptions for the construction of waterworks by a water company to be charged on settled lands.

(*l*) Stats. 8 & 9 Vict. c. 56, ss. 10, 11; 9 & 10 Vict. c. 101, ss. 38,

† Reservoirs
and Water
supply.

‡ Residence.

the Land Charges Registration and Searches Act, 1888 (*m*), rentcharges created under the Acts mentioned on or after the 1st of January, 1889 (*n*), are void as against a purchaser for value of the land charged, or any interest therein, unless duly registered at the office of Land Registry. And after the expiration of one year from the first assignment made by act *inter vivos* after that date of a rentcharge previously created, the person entitled thereto shall not be able to recover the same as against a purchaser for value of the land charged, or any interest therein, unless the charge be duly registered in the same place before the completion of the purchase (*o*).

In addition to the facilities so given for raising money to pay for the improvement of land, capital money arising from the sale of settled land or otherwise under the Settled Land Act, 1882 (*p*), may now be applied at the instance of the tenant for life in payment for any improvement authorized by that Act (*q*).

39; 12 & 13 Vict. c. 100, ss. 21, 26; 27 & 28 Vict. c. 114, ss. 66, 72. Capital money arising under the Settled Land Act, 1882, may now be applied in redeeming such rent charges, when created in respect of an improvement authorized by that Act; stat. 50 & 51 Vict. c. 80, s. 1; *Re Lord Egmont's Settled Estates*, 45 Ch. D.

395.

(*m*) Stat. 51 & 52 Vict. c. 51, s. 12.

(*n*) See sects. 2, 4.

(*o*) Sect. 13.

(*p*) Stat. 45 & 46 Vict. c. 38, s. 21 (iii.); *ante*, p. 117; see Williams's Conveyancing Statutes, 292.

(*q*) (Sect. 35). Improvements authorized by this Act are the making or execution on or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

(i.) Drainage, including the straightening, widening or deepening of drains, streams and watercourses:

(ii.) Irrigation; warping:

(iii.) Drains, pipes and machinery for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

Tenant for life
must submit
a scheme.

But in order to obtain this, the tenant for life is required, before the work is done, to submit to the trustees or the Court a scheme for the execution of the improvement shewing the proposed expenditure

- (v.) Groynes; sea walls, defences against water:
 - (vi.) Inclosing; straightening of fences; re-division of fields:
 - (vii.) Reclamation; dry warping:
 - (viii.) Farm roads; private roads; roads or streets in villages or towns:
 - (ix.) Clearing; trenching; planting:
 - (x.) Cottages for labourers, farm servants, and artisans, employed on the settled land or not; and (by stat. 48 & 49 Vict. c. 72, s. 11) any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate. See stat. 53 & 54 Vict. c. 69, s. 18.
 - (xi.) Farmhouses, offices and outbuildings, and other places for farm purposes:
 - (xii.) Saw mills, scutch mills, and other mills, water wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes, or as woodland or otherwise:
 - (xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water, for agricultural, manufacturing, or other purposes, or for domestic or other consumption:
 - (xiv.) Tramways; railways; canals; docks:
 - (xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals and of things required for mining purposes:
 - (xvi.) Markets and market places:
 - (xvii.) Streets, roads, paths, squares, gardens or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land:
 - (xviii.) Sewers, drains, watercourses, pipe making, fencing, paving, brick making, tile making, and other works necessary or proper in connection with any of the objects aforesaid:
 - (xix.) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines:
 - (xx.) Reconstruction, enlargement or improvement of any of those works.
- By stat. 53 & 54 Vict. c. 69, s. 18, improvements authorized by the Act of 1882 shall include:
- (i.) Bridges:
 - (ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let:
 - (iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof:
 - (iv.) The rebuilding of the principal mansion house on the settled land: provided that the sum to be so applied shall not exceed one half of the annual rental of the settled land.

thereon (*r*). And a certificate of the Board of Agriculture, or of an engineer or surveyor approved by them, certifying that the work has been properly done and the amount properly payable by the trustees in respect thereof, or else an order of the Court is required before any capital money can be applied in payment for the improvement (*s*). But the Court may, in any case where it appears proper, make an order directing capital money to be applied in payment for any authorized improvement, notwithstanding that a scheme was not submitted, as required, before the execution of the improvement (*t*). The tenant for life is required to maintain improvements executed under the Act (*u*); and is protected from impeachment of waste (*x*) in respect of any stone, clay, sand, or other substance properly gotten, or timber properly cut for the purpose of making or maintaining any such improvement (*y*). Under the same Act (*z*) a tenant for life may join or concur with any other person interested in executing any improvement authorized by the Act, or in contributing to the cost thereof. In all other respects, improvements which a tenant for life may wish to make must be paid for out of his own pocket (*a*). Other improvements.

Where land is given to a widow during her widowhood, or to a man until he shall become bankrupt (*b*), Determinable life estates.

(*r*) Stat. 45 & 46 Vict. c. 38, s. 26, sub-s. 1; *Re Hotchkin's Settled Estates*, 35 Ch. D. 41; see *Re Bulwer Lytton's Will*, 38 Ch. D. 20.

(*s*) Sect. 26, sub-ss. 2, 3; stat. 52 & 53 Vict. c. 50.

(*t*) Stat. 53 & 54 Vict. c. 69, s. 13.

(*u*) Stat. 45 & 46 Vict. c. 38, s. 28.

(*x*) *Ante*, p. 109.

(*y*) Sect. 29.

(*a*) Stat. 45 & 46 Vict. c. 38,

s. 27.

(*a*) *Nairn v. Marjoribanks*, 3 Russ. 582; *Hibbert v. Cooke*, 1 Sim. & Stu. 552; *Caldecott v. Brown*, 2 Hare, 144; *Horlock v. Smith*, 17 Beav. 572; *Dunne v. Dunne*, 7 De Gex, M. & G. 207; *Dent v. Dent*, 30 Beav. 363; *Re Leigh's Estate*, L. R. 6 Ch. 887; *Drake v. Trefusis*, L. R., 10 Ch. 364; *Re Broadwater Estate*, 33 W. R. 738.

(*b*) *Ante*, p. 28.

or for any other definite period of time of uncertain duration, a freehold estate is conferred, as in the case of a gift for life (*c*). Such estates are regarded in law as determinable life estates (*d*); and their incidents are generally the same as those of ordinary life estates. A difference may occur in the right to take the emblements, that is, the right of a tenant to reap the crop that he has sown, though he die or his estate terminate before harvest (*e*). Thus, if a tenant for life die before harvest, his executors will be entitled to the emblements, whether his estate were absolute or determinable; and his assignee or undertenant will have the same right. But if the estate should determine by the tenant's own act, as by the marriage of a widow holding during her widowhood, the tenant would have no right to emblements; though the undertenant being no party to the cesser of the estate, would still be entitled in the same manner as on the expiration of the estate by death (*f*). With respect to tenants at rack-rent (*g*), it is now provided that where the lease or tenancy of any farm or lands held by such a tenant shall determine by the death or cesser of the estate of any landlord entitled for his life, or any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, paying a proportionate rent to the succeeding owner (*h*).

Emblements.

Tenants at rack-rent.

Apportionment of rent.

By the common law, if lands were let reserving rent periodically, as on the usual quarter-days, nothing was

(*c*) *Ante*, p. 60.

(*d*) Co. Litt. 42 a; 2 Black. Comm. 121.

(*e*) See 1 Wms. Exors. pt. ii. bk. ii. ch. ii. § ii., pp. 715 *et seq.* 8th ed.; Williams on Personal Property, 26, 13th ed.

(*f*) Co. Litt. 55 b; 2 Black. Comm. 122—124; see *Graves v. Weld*, 5 B. & Ad. 105.

(*g*) *Ante*, p. 101, n. (*o*).

(*h*) Stat. 14 & 15 Vict. c. 25, s. 1; *Haines v. Welch*, L. R. 4 C. P. 91.

due from the lessee until the day when the rent became payable (i). Hence in old times if a tenant for life had let the lands reserving rent quarterly or half-yearly, and died between two rent days, no rent was due from the under-tenant to anybody from the last rent day till the time of the decease of the tenant for life. But in the reign of King George II. a remedy for a proportionate part of the rent, according to the time such tenant for life lived, was given by Act of Parliament to his executors or administrators (k). Formerly, also, when a tenant for life had a power of leasing (l), and let the lands accordingly, reserving rent periodically, his executors had no right to a proportion of the rent, in the event of his decease between two quarter days; and, as rent is not due till midnight of the day on which it is made payable, if the tenant for life had died even on the quarter-day, but before midnight, his executors lost the quarter's rent, which went to the person next entitled (m). But by a modern Act of Parliament (n) the executors and administrators of any tenant for life who had granted a lease since the 16th of June, 1834, the date of the Act, might claim an apportionment of the rent from the person next entitled, when it should become due. This Act, however, did not apply unless the demise were made by an instrument in writing (o). But the Apportionment Act, 1870 (p), now provides (q), that after the passing of that Act, which took place on the 1st of August, 1870, all rents and other periodical

(i) Co. Litt. 292 b; 3 Rep. 128.

(k) Stat. 11 Geo. II. c. 19 s. 15, explained by stat. 4 & 5 Will. IV. c. 22, s. 1. See *Ex parte Smyth*, 1 Swanst. 387, and the learned editor's note.

(l) See *ante*, p. 112.

(m) *Norris v. Harrison*, 2 Mad. 268.

(n) Stat. 4 & 5 Will. IV. c. 22, s. 2; *Lock v. De Burgh*, 4 De G.

& S. 470; *Plummer v. Whiteley*, Johnson, 585; *Llewellyn v. Rouse*, L. R. 2 Eq. 27; 85 Beav. 591.

(o) See *Cattley v. Arnold*, 5 Jur., N. S. 361; 7 W. Rep. 245; 1 J. & H. 651; *Mills v. Trumper*, L. R. 4 Ch. 320.

(p) Stat. 33 & 34 Vict. c. 35; *Hastuck v. Pedley*, L. R. 19 Eq. 271; *Constable v. Constable*, 11 Ch. D. 681.

(q) Sect. 2.

Apportionment Act, 1870.

payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

An estate *pur autre vie*.

If a tenant for his own life assign his estate to another, the assignee will become entitled to an estate for the life of the former. This, in the Norman-French, with which our law still abounds, is called an estate *pur autre vie* (r): and the person for whose life the land is holden is called the *cestui que vie*. An estate *pur autre vie* has long been an estate of freehold (s); though in early times this was not so (t). In this case, as well as in that of an original grant, the new owner was formerly entitled only so long as he lived to enjoy the property, unless the grant were expressly extended to his heirs, so that, in case of the decease of the new owner in the lifetime of the *cestui que vie*, the land was left without an occupant so long as the life of the latter continued, for the law would not allow him to re-enter after having parted with his life estate (u). No person having therefore a right to the property, anybody might enter on the land, and he that first entered might lawfully retain possession so long as the *cestui que vie* lived (v). The person who had so entered was called a *general occupant*. If, however, the estate had been granted to a man *and his heirs* during the life of the *cestui que vie*, the heir might, and still may, enter and hold possession; and in such a case he is called in law a *special occupant*, having a special right of occupation by the terms of the grant (y). To remedy the evil

General occupant.

Special occupant.

(r) Litt. s. 56.

(s) Litt. s. 57.

(t) Bract. fo. 26 b, 263 a; Fleta, lib. iii. c. 12, § 6; lib. v. c. 5, § 15.

(u) In very early times the law was otherwise. Bract. fo. 27 a,

263 a; Fleta, lib. iii. c. 12, § 6; lib. v. c. 5, § 15.

(v) Co. Litt. 41 b; 2 Black. Comm. 258.

(y) *Atkinson v. Baker*. 4 T. Rep. 229.

occasioned by property remaining without an owner, it was provided by a clause in a famous statute passed in the reign of King Charles II. (z), that the owner of an estate *pur autre vie* might dispose thereof by his will; that if no such disposition should be made, the heir, as occupant, should be charged with the debts of his ancestor; or, in case there should be no special occupant, it should go to his executors or administrators, and be subject to the payment of his debts, of course only during the residue of the life of the *cestui que vie*. In the construction of this enactment a question arose, whether or not, supposing the owner of an estate *pur autre vie* died without a will, the administrator was to be entitled for his own benefit, after paying the debts of the deceased. An explanatory Act was accordingly passed in the reign of King George II. (a), by which the surplus, after payment of debt, was, in case of intestacy, made distributable amongst the next of kin, in the same manner as personal estate. By the Wills Act of 1837 (b), the above enactments were both replaced by more comprehensive provisions to the same effect.

Statute of
Frauds.

Modern
enactmen

When one person has an estate for the life of another, it is evidently his interest that the *cestui que vie*, or he for whose life the estate is holden, should live as long as possible; and, in the event of his decease, a temptation might occur to a fraudulent owner to conceal his death. In order to prevent any such fraud, it is provided, by an Act of Parliament passed in the reign of Queen Anne (c), that any person having any claim in remainder, reversion or expectancy, may, upon affidavit

Cestui que vie
may be
ordered to be
produced.

(z) The Statute of Frauds, 29 Car. II. c. 3, s. 12.

(a) Stat. 14 Geo. II. c. 20, s. 9; see Co. Litt. 41 b. n. (15)

(b) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 6.

(c) Stat. 6 Anne, c. 18. See

Ex parte Grant, 6 Ves. 512; *Ex parte Whalley*, 4 Russ. 561; *Re Isaac*, 4 Myl. & Craig. 11; *Re Lingen*, 12 Sim. 104; *Re Clossey*, 2 Sm. & G. 48; *Re Dennis*, 7 Jur. N. S. 280; *Re Owen*, 10 Ch. D. 166; *Re Stevens*, 81 Ch. D. 520.

that he hath cause to believe that the *cestui que vie* is dead, and that his death is concealed, obtained an order from the Lord Chancellor for the production of the *cestui que vie* in the method prescribed by the Act; and if such order be not complied with, then the *cestui que vie* shall be taken to be dead, and any person claiming any interest in remainder, or reversion, or otherwise, may enter accordingly. The Act, moreover, provides (*d*), that any person having any estate *pur autre vie*, who after the determination of such estate, shall continue in possession of any lands, without the express consent of the persons next entitled, shall be adjudged a trespasser, and may be proceeded against accordingly.

Quasi entail.

If an estate *pur autre vie* should be given to a person and the heirs of his body, a *quasi entail*, as it is called, will be created, and the estate will descend, during its continuance, in the same manner as an ordinary estate tail. But the owner of such an estate in possession may bar his issue, and all remainders, by an ordinary deed of conveyance (*e*), without any inrolment under the statute for the abolition of fines and recoveries. If the estate tail be in remainder expectant on an estate for life, the concurrence of the tenant for life is necessary to enable the tenant in tail to defeat the subsequent remainders (*f*).

Persons having the powers of a tenant for life under the Settled Land Act, 1882.

It is important to notice that all the powers of a tenant for life under the Settled Land Act, 1882 (*g*), are by that Act (*h*) expressly conferred on each of the following persons, when his estate or interest is in possession:—

(*d*) Stat. 6 Anne, c. 18, s. 5.

(*e*) Fearne, Cont. Rem. 495 et

seq.

(*f*) *Allen v. Allen*, 2 Dru. & War. 307, 324, 332; *Edwards v.*

Champion, 8 De Gex, M. & G. 202.

(*g*) *Ante*, pp. 114—120.

(*h*) Stat. 45 & 46 Vict. c. 38, s. 58, sub-s. 1 (iv., v., vi., ix.).

(a) A tenant for years determinable on life, not holding merely under a lease at a rent;

(b) A tenant for the life of another, not holding ^{Tenant *pur*} _{*autre vie.*} merely under a lease at a rent;

(c) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease or be defeated in any event during that life (i), or is subject to a trust for accumulation of income.

In addition to estates for life expressly created by the acts of the parties, there are certain life interests, created by construction and operation of law, possessed by husbands and wives in each other's land. These interests will be spoken of in a future chapter. There are also certain other life estates held by persons subject to peculiar laws; such as the life estates held by beneficed clergymen. These estates are exceptions from the general law; and a discussion of them, in an elementary work like the present, would tend rather to confuse the student than to aid him in his grasp of those general principles, which it should be his first object to comprehend.

(i) See *ante*, pp. 78, 123, 124.

CHAPTER V.

OF JOINT TENANTS AND TENANTS IN COMMON.

The four unities of joint tenancy.

Joint tenants for life.

Joint tenants in tail.

A GIFT of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. As between themselves, they must, of course, have separate rights; but such rights are equal in every respect, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. A joint tenancy is accordingly said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of the *time* of the commencement of such title (a). Any estate may be held in joint tenancy; thus, if lands be given simply to A. and B. without further words, they will become at once joint tenants for life (b). Being regarded, with respect to other persons, as but one individual, their estates will necessarily continue so long as the longer liver of them exists. While they both live, as they must have several rights between themselves, A. will be entitled to one moiety of the rents and profits of the land, and B. to the other; but after the decease of either of them, the survivor will be entitled to the whole during the residue of his life. So, if lands be given to A. and B. and the heirs of their two bodies; here, if A. and B. be persons who may possibly intermarry, they will have an estate in special tail, descendible only to the heirs of their two bodies (c): so long as

(a) 2 Black. Comm. 180.

(b) Litt. s. 288; Com. Dig. tit. Estates (K. 1); see ante,

p. 105.

(c) Co. Litt. 20 b, 25 b; Bac. Abr. tit. Joint Tenants (G).

they both live, they will be entitled to the rents and profits in equal shares; after the decease of either, the survivor will be entitled for life to the whole; and, on the decease of such survivor, the heir of their bodies, in case they should have intermarried, will succeed by descent, in the same manner as if both A. and B. had been but one ancestor. If, however, A. and B. be persons who cannot at any time lawfully intermarry, as, if they be brother and sister, or both males, or both females, a gift to them and the heirs of their two bodies will receive a somewhat different construction. So long as it is possible for a unity of interest to continue, the law will carry it into effect: A. and B. will accordingly be regarded as one person, and will be entitled jointly during their lives. While they both live their rights will be equal; and, on the death of either, the survivor will take the whole so long as he may live. But, as they cannot intermarry, it is not possible that any one person should be heir of both their bodies: on the decease of the survivor, the law, therefore, in order to conform as nearly as possible to the manifest intent, that the heir of the body of each of them should inherit, is obliged to sever the tenancy and divide the inheritance between the heir of the body of A., and the heir of the body of B. Each heir will accordingly be entitled to a moiety of the rents and profits, as tenant in tail of such moiety. The heirs will now hold in a manner denominated tenancy in common; instead of both having the whole, each will have an undivided half, and no further right of survivorship will remain (d).

An estate in fee simple may also be given to two or more persons as joint tenants. The unity of this kind of tenure is remarkably shown by the words which are made use of to create a joint tenancy in fee simple. Joint tenants
in fee.

(d) Litt. s. 283. See *Re Tiverton Market Act*, 20 Beav. 374.

Trustees are
always made
joint tenants.

The lands intended to be given to joint tenants in fee simple are limited to them *and their heirs*, or to them, *their heirs and assigns* (e), although the heirs of one of them will only succeed to the inheritance, provided the joint tenancy be allowed to continue: thus, if lands be given to A., B. and C. *and their heirs*, A., B. and C. will together be regarded as one person; and, when they are all dead, but not before, the lands will descend to the heirs of the artificial person (so to speak) named in the gift. The survivor of the three, who together compose the tenant, will, after the decease of his companions, become entitled to the whole lands (f). While they all lived each had the whole; when any die, the survivor or survivors can have no more. The heir of the survivor is, therefore, the person who alone will be entitled to inherit, to the entire exclusion of the heirs of those who may have previously died (g). A joint tenancy in fee simple is far more usual than a joint tenancy for life or in tail. Its principal use in practice is for the purpose of vesting estates in trustees, who, as we shall see, are persons entrusted with the legal ownership of lands for the benefit of others (h). Such persons are invariably made joint tenants. On the decease of one of them, the whole estate then vests at once in the survivors or survivor of them, without devolving on the heir at law of the deceased trustee, and without being affected by any disposition which he may have made by his will; for joint tenants are incapable of devising their respective shares by will (i); they are not regarded as having any separate interests, except as between or amongst themselves, whilst two or more of them are

(e) Bac. Abr. tit. Joint Tenants (A); Co. Litt. 184 a.

(f) Litt. s. 280. Any joint tenant taking a beneficial interest by survivorship is now liable to succession duty and may also be liable to estate duty; stats. 16 &

17 Vict. c. 51, s. 3; 51 Vict. c. 8, s. 21; 52 Vict. c. 7, s. 6; see the end of Chapter x.

(g) Litt. *ubi sup.*

(h) See *post*, Chapter vii.

(i) Litt. s. 287; Perk. s. 500.

living. Trustees, therefore, whose only interest is that of the persons for whom they hold in trust, are properly made joint tenants. As a rule, the survivor of several joint tenants in fee simple may devise the land, as well as allow it to descend to his heir. But, if such survivor be a trustee of the land, on his death after the year 1881, his estate will vest in his personal representatives, notwithstanding any testamentary disposition he may make (*j*).

As joint tenants together compose but one owner, it follows, as we have already observed, that the estate of each must arise at the same time (*k*); so that if A. and B. are to be joint tenants of lands, A. cannot take his share first, and then B. come in after him. To this rule, however, an exception has been made in favour of conveyances taking effect by virtue of the Statute of Uses, to be hereafter explained; for it has been held that joint tenants under this statute may take their shares at different times (*l*); and the exception appears also to extend to estates created by will (*m*). A further consequence of the unity of joint tenants is seen in the fact, that if one of them should wish to dispose of his interest in favour of any of his companions, he may not make use of any mode of disposition operating merely as a conveyance of lands from one stranger to another. The legal possession or seisin of the whole of the lands belongs to each one of the joint tenants of an estate of freehold; no delivery can, therefore, be made to him of that which he already has. The proper form of assurance between joint tenants is, accordingly, a release by

Exception to
unity of time.

A release is
the proper
form of
assurance
between joint
tenants.

(*j*) Stat. 44 & 45 Vict. c. 41, s. 30.

(*k*) Co. Litt. 188 a; 2 Black. Comm. 181.

(*l*) 13 Rep. 56; Pollexf. 373; Bac. Abr. tit. Joint Tenants (D); Gilb. Uses and Trusts, 71 (185, n. 10, 3rd ed.).

(*m*) 2 Jarman on Wills, 254, 255, 4th ed.; *Oates d. Hatterly v. Jackson*, 2 Strange, 1172; Fearn, Cont. Rem. 818; *Bridge v. Yates*, 19 Sim. 645; *Kensworthy v. Ward*, 11 Hare, 196; *M'Gregor v. M'Gregor*, 1 De Gex, F. & J. 73.

deed (n), and this release operates rather as an extinguishment of right than as a conveyance; for the whole estate is already supposed to be vested in each joint tenant, as well as his own proportion. And in the Norman-French, with which our law abounds, two persons holding land in joint tenancy are said to be seised *per mie et per tout* (o).

A joint tenancy may be severed.

The incidents of a joint tenancy, above referred to, last only so long as the joint tenancy exists. It is in the power of any one of the joint tenants to *sever* the tenancy; for each joint tenant possesses an absolute power to dispose, in his lifetime, of his own share of the lands, by which means he destroys the joint tenancy (p). Thus, if there be three joint tenants of lands in fee simple, any one of them may, by any of the usual modes of alienation, dispose during his lifetime, though not by will, of an equal undivided third part of the whole inheritance. But should he die without having made such disposition, each one of the remaining two will have a similar right in his lifetime to dispose of an undivided moiety of the whole. From the moment of severance, the unity of interest and title is destroyed, and nothing is left but the unity of possession; the share which has been disposed of is at once discharged from the rights and incidents of joint tenancy, and becomes the subject of a tenancy in common. Thus, if there be three joint tenants, and any one of them should exercise his power of disposition in favour of a stranger, such stranger will then hold one undivided third part of the lands, as tenant in common with the remaining two.

(n) Co. Litt. 189 a; Bac. Abr. tit. Joint Tenants (1) 3, 2; 2 Prest. Abst. 61. But a grant would operate as a release; *Chester v. Willan*, 2 Wms. Saund.

96 a.

(o) Litt. s. 288.

(p) Co. Litt. 186 a; *Caldwell v. Fellowes*, L. R., 9 Eq. 410.

Tenants in common are such as have a unity of possession, but a distinct and several title to their shares (q). The shares in which tenants in common hold are by no means necessarily equal. Thus, one tenant in common may be entitled to one-third, or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seised in fee of his, and the owners of another undivided share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate.

When the rights of parties are distinct, that is, for instance, when they are not all trustees for one and the same purpose, both a joint tenancy and a tenancy in common are inconvenient methods for the enjoyment of property. Of the two a tenancy in common is no doubt preferable; inasmuch as a certain possession of a given share is preferable to a simular chance of getting or losing the whole, according as the tenant may or may not survive his companions. But the enjoyment of lands in *severalty*, or as a single owner, is far more beneficial than either of the above modes. Accordingly it is in the power of any joint tenant or tenant in common to compel his companions to effect a *partition* between themselves, according to the value of their shares. This partition was formerly enforced by a writ of partition, granted by virtue of statutes passed in the reign of Henry VIII. (r). Before this reign, as joint

(q) Litt. s. 292; 2 Black. Comm. 191.

(r) 31 Hen. VIII. c. 1; 32 Hen. VIII. c. 32.

Partition by
Court of
Chancery.

By High
Court of
Justice.

Partition by
Board of
Agriculture.

tenants and tenants in common always become such by their own act and agreement, they were without any remedy, unless they all agreed to the partition. In modern times it was found more convenient to resort to the jurisdiction, which the Court of Chancery had acquired, to compel the partition of estates (*s*); and in 1833 (*t*) the old writ of partition, which had already become obsolete, was abolished. Since 1875, this jurisdiction has been exercisable in the Chancery Division of the High Court of Justice (*u*). Whether the partition be effected through the agency of the Court, or by the mere private agreement of the parties, mutual conveyances of their respective undivided shares must be made, in order to carry the partition into complete effect (*x*). With respect to joint tenants, these conveyances ought, as we have seen, to be in the form of releases; but tenants in common, having separate titles, must make mutual conveyances, as between strangers; and by a modern statute it is provided, that a partition shall be void at law, unless made by deed (*y*). By the Settled Land Act, 1882 (*z*), the tenant for life under a settlement of an undivided share of land is empowered to concur in making partition of the entirety, and to convey the land given on partition for all the estate, which is the subject of the settlement, in the manner requisite for giving effect to the partition. Another very convenient mode of effecting a partition is, by application to the Board of Agriculture, who are em-

(*s*) See *Manners v. Charlensworth*, 1 Mylne & Keen, 380.

(*t*) Stat. 8 & 4 Will. IV. c. 27, s. 86.

(*u*) Stats. 36 & 37 Vict. c. 66, ss. 16, 17, 34; 37 & 38 Vict. c. 33.

(*z*) *Attorney-General v. Hamilton*, 1 Madd. 214. If any of the parties entitled should be infants or lunatics, and so unable to execute a conveyance, an order

may be made vesting their shares in such persons as shall be directed; stats. 18 & 14 Vict. c. 80, ss. 7, 30; 53 Vict. c. 5, s. 135.

(*y*) Stat. 8 & 9 Vict. c. 106, s. 8, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

(*x*) Stat. 45 & 46 Vict. c. 38, ss. 3, 20; see Williams's Conveyancing Statutes, 295-297, 321-325.

powered by recent Acts of Parliament to make orders under their hands and seal for the partition and exchange of lands and other hereditaments, which orders are effectual without any further conveyance or release (a).

The jurisdiction of the Court of Chancery with regard to partition (now exercisable, as we have seen, in the Chancery Division) was extended by the Partition Act, 1868 (b). By this Act the Court is empowered to direct a sale of the property instead of a partition, whenever a sale and distribution of the proceeds appears to the Court to be more beneficial to the parties interested (c). If the parties interested to the extent of a moiety or upwards request a sale, the Court *shall*, unless it sees good reason to the contrary, direct a sale of the property accordingly (d). And if any party interested requests a sale the Court *may*, if it thinks fit, unless the other parties interested or some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property (e). This alteration of the law, which was some time since suggested by the late author (f), has effected a substantial improvement.

(a) These powers were first given to the Inclosure Commissioners (in 1882 styled the Land Commissioners) and were transferred to the Board of Agriculture in 1889; see stats. 8 & 9 Vict. c. 118, ss. 147, 150; 9 & 10 Vict. c. 70, ss. 9, 10, 11; 10 & 11 Vict. c. 111, ss. 4, 6; 11 & 12 Vict. c. 99, ss. 13, 14; 12 & 13 Vict. c. 88, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97, s. 5; 20 & 21 Vict. c. 81, ss. 1—11; 21 & 22 Vict. c. 53; 22 & 23 Vict. c. 43, ss. 10, 11; 39 & 40 Vict. c. 56, s. 33; 45 & 46

Vict. c. 38, s. 48; 52 & 53 Vict. c. 80, s. 2; Williams's Conveyancing Statutes, 348—350.

(b) Stat. 31 & 32 Vict. c. 40, amended by stat. 39 & 40 Vict. c. 17.

(c) Sect. 3.

(d) Sect. 4; *Wilkinson v. Jobbins*, L. R., 16 Eq. 14; *Porter v. Lopes*, 7 Ch. D. 358.

(e) Stat. 37 & 38 Vict. c. 83, s. 5; see *Williams v. Games*, L. R., 10 Ch. 204; *Pitt v. Jones*, 5 App. Cas. 651; *Richardson v. Feary*, 39 Ch. D. 45.

(f) Essay on Real Assets, p. 129.

CHAPTER VI.

OF THE CONVEYANCE OF A FREEHOLDING AT
COMMON LAW.

LET us now turn our attention to the means of conveying a freeholding (*a*) of land—what the law requires to effect a valid transfer from one person to another of an estate of freehold (*b*). This has always been and still is a formal matter; mere expression of intention will not suffice to transfer freehold property at law, unless the requisite forms be duly observed (*c*). These forms are not the same now as they were in earlier times. By the common law delivery of possession was principally necessary to effect the conveyance of a freehold: while at the present day the chief requisite is a deed (*d*). But no one can hope to exercise the modern conveyancing art with understanding, without some knowledge of the early law. For the whole modern law of real property is nothing but a tangle of heterogeneous devices for escaping the effect of the common law rules regarding land. And it will yield up its reason to no one, who lacks the patience to learn its history. I would therefore entreat the student to lay aside the notion, that the study of what is obsolete in practice must necessarily be waste of time, and will beg him again to consider with me the law of bygone days.

Feoffment
with livery
of seisin.

By the common law a freeholding of land was chiefly

(*a*) *Ants.* p. 18.

(*b*) *Ants.* p. 60.

(*c*) Bract. fo. 39 b; Litt. ss.
9, 66, 70; *Ward v. Audland*, 8

Beav. 201, 212; *Woodford v. Charnley*, 28 Beav. 96.

(*d*) Stat. 8 & 9 Vict. c. 106, ss.
2, 3.

transferable by *feoffment* with *livery of seisin*; that is, by the gift of a freehold estate in the land, coupled with formal delivery of possession. Feoffment is properly the gift of a *fief* or *fee* (*e*); such as was usually conferred in the days of subinfeudation (*f*): but the word came to be applied to the gift of any freehold estate (*g*). Seisin, as we have seen, originally meant any kind of possession, but was not afterwards used to denote any but freehold possession—the possession recoverable in real or mixed actions (*h*). At common law a feoffment need not have been put into writing; it was sufficient to express the gift by word of mouth (*i*): but formal livery of seisin was absolutely necessary to perfect the gift (*k*). This was of two kinds: livery in deed and livery in law. Livery in deed was performed *on the land* to be conveyed by the person making the feoffment (called the *feoffor*) expressing by appropriate act (*l*) and words, or words alone, his intention to deliver seisin of the land to the *feoffee*, or person to be enfeoffed, and yielding up vacant possession thereof accordingly (*m*). And it was requisite, in order to secure the delivery of vacant possession to the feoffee, that all persons who had any estate or possession in the land, of which seisin was delivered, should either join in or consent to making the livery, or be absent from the premises (*n*). If a feoffment were made of different lands lying scattered in the same county (as was usually the case in the days of common fields (*o*)), livery of seisin of any parcel in the name of the rest was sufficient for all,

(*e*) *Ante*, p. 18.

(*f*) *Ante*, p. 37.

(*g*) Litt. s. 57; Co. Litt. 9 a.

(*h*) *Ante*, p. 35.

(*i*) Bract. fo. 83 b; Litt. ss. 214—217.

(*k*) Glanv. vii. 1; Bract. fo. 88, 39 b; Litt. ss. 59, 66. Mere entry by a feoffee was insufficient; Litt. s. 70.

(*l*) Such as the delivery of the

hasp of the door, or a twig, or a turf.

(*m*) Bract. fo. 39 b *et seq.*; Co. Litt. 48 a.

(*n*) Bract. fo. 39 b, 40 b, 41 b, 42, 49, 50; Shep. Touch. 213; *Doe d. Reed v. Taylor*, 5 B. & Ad. 575.

(*o*) *Ante*, p. 40; see Bract. fo. 40 a, 42 b

Livery in deed.

if all were in the complete possession of the same feoffor; but if they were in several counties, there must have been as many liveries as there were counties (*p*). For if the title to these lands should come to be disputed, there must have been as many trials as there were counties; and the jury of one county are not considered judges of the notoriety of a fact in

Livery in law. another (*q*). Livery in law was made, not *on* the land, but *in sight of it* only, by the feoffor telling the feoffee to enter and take possession. If the feoffee entered accordingly in the lifetime of the feoffor, this was a good feoffment; but if either the feoffor or feoffee died before entry, the livery was void (*r*). This livery was good, although the land lay in another county (*s*); but it required always to be made between the parties themselves, and could not be deputed to an attorney, as might livery in deed (*t*). The word *give* was the apt and technical term to be employed in a feoffment (*u*); its use arose in those times when gifts from feudal lords to their tenants were the conveyances principally employed.

The word *give* to be used.

The estate taken must be marked out or limited.

Besides livery of seisin, it was necessary, whether a feoffment were made with or without writing, that the estate to be taken by the feoffee should be marked out, or *limited*, as it is called; that is, that the extent of the feoffee's interest should be ascertained by the proper technical words. Thus, if it were intended to convey an estate of inheritance to the feoffee, it was essential that the gift should be made to him and his

(*p*) Litt. s. 61. But a manor, the site of which extended into two counties, appears to have been an exception to this rule; for it was but as one thing for the purpose of a feoffment; Perkins, sect. 227. See, however, Hale's MS., Co. Litt. 50 a, n. (2).

(*q*) Co. Litt. 50 a; 2 Black. Comm. 815.

(*r*) Co. Litt. 48 b; 2 Black. Comm. 816.

(*s*) Co. Litt. 48 b.

(*t*) Co. Litt. 52 b.

(*u*) Co. Litt. 9 a; 2 Black. Comm. 810.

heirs, or to him and the *heirs of his body*, according as it were desired to limit an estate in fee simple or fee tail (*x*). In the latter case words of procreation, such as "of his body," were necessary, as well as the words of inheritance (*heirs*); for a gift to a man and his heirs *male* conferred on him an estate in fee simple and not in tail, there being no words to ascertain the body out of which such heirs should issue; and an estate in lands descendible to collateral male heirs only, in entire exclusion of females, is unknown to the English law (*y*). If the land were given to the feoffee simply, without further words, we have seen that he would take an estate for his life only (*z*). And the same result would follow if it were attempted to confer on him a larger estate without using the proper technical words. Thus, if lands were given to a man to have and to hold to *him for ever* or to him *and his assigns* for ever, he had but an estate for life for want of the word *heirs* (*a*). For the same reason a gift to a man *and his seed*, or to him *and his offspring*, or to him *and the issue of his body*, would only confer upon him a life estate and not an estate tail (*b*). This necessity of using the word *heirs* to mark out or limit an estate in fee seems to have been derived from the times before the alienation of land was freely permitted, when the tenant's heir was the only person who could succeed to his estate (*c*). As we have seen, a gift of land would then confer no fee, unless an intention were expressed that the donee's heir should succeed him (*d*). And though tenants in fee simple were afterwards enabled to dispose of their lands so as to defeat the expectation of their heirs, the liberty so gained was treated as incident to their

(*x*) Litt. s. 1.

(*y*) Litt. s. 31; Co. Litt. 20 b, 27; 2 Black. Comm. 114, 115; *Doe d. Bruns v. Martyn*, 8 B. & C. 497.

(*z*) *Ante*, p. 105.

(*a*) Litt. s. 1.

(*b*) Co. Litt. 20; 2 Black. Comm. 115.

(*c*) *Ante*, pp. 19, 22, 68—70.

(*d*) *Ante*, p. 106.

estates (e). So that what remained essential, on the gift of a fee simple, was to use apt words to confer an *hereditary* estate, to which the law would annex the power of alienation. But it was not necessary, after the statute of *Quia Emptores*, expressly to confer an *assignable* estate (f). And though in later times it became a common form to convey land to a purchaser, to hold to him *his heirs and assigns for ever* (g), yet the word *heirs* alone gave him a fee simple, of which the law enabled him to dispose; and the remaining words *and assigns for ever* had no conveyancing virtue at all; but were merely declaratory of that power of alienation which the purchaser would have possessed without them.

A feoffment might have created an estate by wrong.

The delivery of possession which always took place in a feoffment, rendered it an assurance of great power; for the law permits one, who has obtained actual possession of land, to maintain it against all others, except those who may lawfully claim the land under a prior title (h). If, therefore, a person should have made a feoffment to another of an estate in fee simple, or of any other estate, not warranted by his own interest in the lands, such a feoffment would have operated (as it was said) *by wrong*. That is to say, it would have conferred on the feoffee the whole estate limited by the feoffment, and would have enabled him to maintain the seisin actually delivered to him against all, but those, whose prior title was displaced by the feoffment. And even they were in certain cases deprived of all right to enter upon the land, and left with nothing but a right to bring an action for its recovery (i). Thus if a tenant

Feoffment by tenant in tail or for life.

(e) *Ante*, pp. 68—66.

(f) *Ante*, p. 69.

(g) See 2 Black. Comm. Appx., i. vi.

(h) Bract. fo. 80 b, 81; Cole on Ejectment, 287; Williams on Seisin, 7; Holmes on the Common

Law, 244.

(i) Generally descent to the heir of the actual possessor was required to take away the right of entry. But feoffments by tenants in tail, and one or two others, put the injured parties to their action.

in tail or for his own life should have made a feoffment of the lands for an estate in fee simple, the feoffee would not merely have acquired an estate for the life of the feoffor, but would have become seised of an estate in fee simple by wrong (*k*). In the case of a tenant for life, who has no fee and whose position in early times was that of lessee rather than owner (*l*), such a feoffment was held to be a cause of forfeiture to the person next entitled after his death; as being a conveyance of such person's interest to another without his consent (*m*). But a feoffment by tenant in tail conferred an estate indefeasible during his life (*n*). At the present day, however, an estate by wrong can no longer be created by feoffment; an Act of 1845 providing that a feoffment shall not have any tortious operation (*o*)

Down to the time of King Henry VIII. nothing more was requisite to a valid feoffment than has been already mentioned. In the reign of this king, however, an Act of Parliament of great importance was passed, known by the name of the Statute of Uses (*p*). And after this statute, it became further requisite to a feoffment, either that there should be a *consideration* for the gift, or that it should be expressed to be made, not simply *unto*, but *unto and to the use of*, the feoffee. The manner in which this result was brought about by the Statute of Uses will be explained in the next chapter.

The Statute of Uses.

A consideration required, or the gift to be made to the use of the feoffee.

If proper words of gift were used in a feoffment, Writing formerly unnecessary.

See Litt. ss. 385 *et seq.*, 415, 592—600; Co. Litt. 239 a, n. (1), 325 a, n. (1), 330 b, n. (1).

(*k*) Litt. ss. 599, 611; see *ante*, pp. 101, 112.

(*l*) Litt. s. 57; *ante*, p. 107.

(*m*) Litt. ss. 415, 416, 609—611, 631; Co. Litt. 251; see Bract. fo. 31 a, for earlier law. So a feoff-

ment in fee by a tenant for years was a cause of forfeiture; Litt. s. 611; Co. Litt. 233 b, 251 b, 330 b, n. (1).

(*n*) Litt. ss. 595—600, 605—614, 649, 650.

(*o*) Stat. 8 & 9 Vict. c. 106, s. 4.

(*p*) Stat. 27 Hen. VIII. c. 10.

Charter.

and witnesses were present who could afterwards prove them, it mattered not, in ancient times, whether or not they were put into writing (*q*); though writing, from its greater certainty, was generally employed (*r*). There was this difference, however, between writing in those days, and writing in our own times. In our own times, almost everybody can write; in those days very few of the landed gentry of the country were so learned as to be able to sign their own names (*s*). Accordingly, on every important occasion, when a written document was required, instead of signing their names, they affixed their seals (*t*); and this writing, thus sealed, was delivered to the party for whose benefit it was intended. Writing was not then employed for every trivial purpose, but was a matter of some solemnity. And a charter, or writing whereby a man formally expressed an intention of gift, or bound himself to perform any act, was held to afford conclusive proof of the matter expressed therein, unless it were shown to have been forged, or extorted from him by fraud or force, or like objections to its validity were established (*u*). In very early times after the Norman Conquest, it appears that even an unsealed charter might have this effect (*x*). But afterwards it came to be settled (*y*) that a charter must have affixed to it the seal of the person whose act or promise it recorded, in order to be admitted as conclusive evidence against him (*z*). Thenceforward the conclusive effect

(*q*) Bract. fo. 11 b, 33 b; Co. Litt. 48 b, 121 b, 143 a, 271 b, n. (1).

(*r*) Madox's Forms, Angl. Disert. p. 1.

(*s*) 3 Hallam's Middle Ages, 329; 2 Black. Comm. 305, 306.

(*t*) It appears that the use of seals was introduced into England after the Norman Conquest, and that previously the English custom was to make a mark; see Kemble, Codex Diplomaticus, vol. i. Introd. xc.—ci.; Ducange,

Gloss. tit. Sigillum; Bigelow, Placita Anglo-Normannica, 175, 177.

(*u*) Glanv. lib. x. c. 12; Bract. fo. 100, 386; Britton, liv. i. ch. 29, §§ 5, 14—22; fo. 62, 64—66.

(*x*) Bigelow, Pl. Ang.-Norm. 175, 177.

(*y*) Probably as a safeguard against forgery: Holmes on the Common Law, 272.

(*z*) See Year Book, 80 Edw. I. p. 158; Fleta, lib. ii. c. 60, § 25; Britton, liv. i. ch. 29, §§ 17, 19.

which the early law gave to writings was confined to sealed writings. In all legal transactions, therefore, a seal was affixed to the written document, and the writing so sealed was, when delivered, called a *deed*, in Latin ^{A deed.} *factum*, a thing done; nothing in fact was in early times called a *writing* but a document under seal (a). Hence it is that in every transaction, in which *the common law* requires writing, a deed is necessary (b).

This rule remained in force after writing had come into common use, and sealing, as a proof of authenticity, had been superseded by the practice of men signing their names in their own handwriting. So that deeds acquired a superiority over other writings; by which a man was in general no more conclusively bound than by spoken words. Thus agreements made by deed have always been enforceable at law merely by reason of their formal character (c), and without any exception in the case of a gratuitous promise. But with regard to agreements made without deed (although in writing), it was established that a man should not enforce a promise so made to him, unless he had given some pecuniary or other valuable *consideration* in return for it (d). After ^{Consideration.} this doctrine had been broached, the force of a deed in conclusively binding a man who executed it, was erroneously explained by saying that a deed in law imports a consideration (e). And this explanation was erected into a rule of law (f). So that at the present day a *deed*, or a writing sealed and delivered (g), is still

(a) See the authorities cited in note (u) above; Litt. ss. 217, 250, 252, 365—367; Co. Litt. 35 b; Shep. Touch. 320, 321.

(b) Co. Litt. 9, 49 a, 85 a, 121 b, 143 a, 169 a, 172 a; *ante*, p. 81.

(c) Y. B. 45 Edw. III. 24, pl. 30.

(d) See Pollock on Contracts, ch. iii., iv.; Williams on Personal Property, 104—107, 18th ed.;

W.R.P.

Rann v. Hughes, 7 T. R. 350, n.; *ante*, p. 74.

(e) Plowden, 308, 309; Bacon, Reading on the Statute of Uses, 310. See Holmes on the Common Law, 271—273.

(f) 2 Black. Comm. 446; 1 Fonb. Eq. 342, n.; 2 Fonb. Eq. 26.

(g) Co. Litt. 171 b; Sheo Touch. 50.

said to import a consideration, and maintains in many respects a superiority in law over a mere unsealed writing. In modern practice the kind of seal made use of is not regarded, and the mere placing of the finger on a seal already made, is held to be equivalent to sealing (*h*); and the words "I deliver this as my act and deed," which are spoken at the same time, are held to be equivalent to delivery, even if the party keep the deed himself (*i*). The sealing and delivery of a deed are termed the *execution* of it. Occasionally a deed is delivered to a third person not a party to it, to be delivered up to the other party or parties, upon the performance of a condition, as the payment of money or the like. It is then said to be delivered as an *escrow* or mere writing (*scriptum*); for it is not a perfect deed until delivered up on the performance of the condition; but when so delivered up, it operates from the time of its execution (*k*). Any alteration or rasure in or addition to a deed is presumed to have been made before its execution (*l*). And it was formerly held that any alteration, rasure or addition made in a material part of a deed, after its execution by the grantor, even though made by a stranger, would render it void, and that any alteration in a deed made by the party to whom it was delivered, though in words not material, would also render it void (*m*). But a more reasonable doctrine has lately prevailed; and it has now been held that the filling in of the date of the deed, or of the names of the occupiers of the lands conveyed, or any such addition,

Execution.

Escrow

Alteration,
rasure, &c.

(*h*) Shep. Touch. 57; see *National Provincial Bank v. Jackson*, 33 Ch. D. 1.

(*i*) *Doe d. Garnons v. Knight*, 5 Barn. & Cress. 671; *Grugeon v. Gerrard*, 4 You. & Coll. 119, 180; *Exton v. Scott*, 6 Sim. 81; *Fletcher v. Fletcher*, 4 Hare, 67. See also *Hall v. Bainbridge*, 12 Q. B. 699.

(*k*) See Shep. Touch. 58, 59;

Bowker v. Burdekin, 11 Mees. & Wels. 128, 147; *Nash v. Flynn*, 1 Jones & Lat. 162; *Graham v. Graham*, 1 Ves. jun. 275; *Miller-ship v. Brookes*, 5 H. & N. 797; *Watkins v. Nash*, L. R. 20 Eq. 282.

(*l*) *Doe d. Tatum v. Catomore*, 16 Q. B. 745.

(*m*) *Pigot's case*, 11 Rep. 27 a.

if consistent with the purposes of the deed, will not render it void, even though done by the party to whom it has been delivered, after its execution (*n*). If an estate has once been conveyed by a deed, of course the subsequent alteration, or even the destruction, of the deed cannot operate to reconvey the estate; and the deed, even though cancelled, may be given in evidence to show that the estate was conveyed by it whilst it was valid (*o*). But the deed having become void, no action could be brought upon any covenant contained in it (*p*).

Deeds are divided into two kinds, *deeds poll* and *Deeds poll and indentures*: a deed poll being made by one party only, and an indenture being made between two or more parties. Formerly, when deeds were more concise than at present, it was usual, where a deed was made between two parties, to write two copies upon the same piece of parchment, with some word or letters of the alphabet written between them, through which the parchment was cut, often in an indented line, so as to leave half the word or letters on one part, and half on the other, thus serving the purpose of a tally. But at length indenting only came into use (*q*); and now every deed, to which there is more than one party, is cut with an indented or waving line at the top, and is called an *indenture* (*r*). Formerly, when a deed assumed the form of an indenture every person who took any immediate benefit under it was always named as one of the parties (*s*). But it is now enacted that, under an

(*n*) *Aldous v. Cornwell*, L. R., 3 Q. B. 578; *Adeats v. Hives*, 38 Beav. 55.

(*o*) *Lord Ward v. Lumley*, 5 H. & N. 87, 656.

(*p*) *Pygot's case*, 11 Rep. 27 a; Principles of the Law of Personal Property, p. 105, 13th ed.; *Hall v. Chandless*, 4 Bing. 128. It is now felony not only to steal, but

also for any fraudulent purpose to destroy, cancel, obliterate, or conceal any document of title to lands. Stat. 24 & 25 Vict. c. 96, s. 28.

(*q*) 2 Black. Comm. 295.

(*r*) Co. Litt. 143 b.

(*s*) See Co. Litt. 229 a, 231 a; Bacon on Uses, 14.

Person taking
benefit need
not be a
party.

Deed poll.

Writings not
under seal.

1660

The Statute
of Frauds.

Stamps on
deeds.

indenture, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken although the taker thereof be not named a party to the same indenture; also that a deed, purporting to be an indenture, shall have the effect of an indenture, although not actually indented (*t*). A deed made by only one party is polled, or shaved even at the top, and is therefore called a *deed poll*; and, under such a deed, any person may accept a grant, though of course none but the party can make one. All deeds must be written either on paper or parchment (*u*).

So manifest are the advantages of putting down in writing matters of any permanent importance, that, as commerce and civilization advanced, writings not under seal must necessarily have come into frequent use; but, until the reign of King Charles II., the use of writing remained perfectly optional with the parties, in every case which did not require a deed under seal. In this reign, however, an Act of Parliament was passed (*x*), requiring the use of writing in many transactions, which previously might have taken place by mere word of mouth. This Act is intituled "An Act for Prevention of Frauds and Perjuries," and is now commonly called the Statute of Frauds. It enacts (*y*), amongst other things, that all leases, estates, interests of freehold, or term of years, or any uncertain interests, in lands, tenements or hereditaments, made or created by livery of seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same,

(*t*) Stat. 8 & 9 Vict. c. 106, s. 5, repealing stat. 7 & 8 Vict. c. 76, s. 11, to the same effect.

(*u*) Shep. Touch. 54; 2 Black. Comm. 297. Deeds not specially charged with an *ad valorem* or other stamp duty are now subject

to a stamp duty of 10s. Stat. 54 & 55 Vict. c. 39, s. 1 & 1st schedule, replacing stat. 33 & 34 Vict. c. 97.

(*x*) Stat. 29 Car. II. c. 3.

(*y*) Sect. 1.

or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and no greater force and effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding. The only exception to this sweeping enactment is in An exception. favour of leases not exceeding three years from the making, and on which a rent of two-thirds at least of the full improved value is reserved to the landlord (z). In consequence of this Act, it became necessary that a feoffment should be put into writing, and signed by the party making the same, or his agent lawfully authorized by writing; but a deed or writing *under seal* was not essential (a), if livery of seisin were duly made. But now by the Act to amend the law of real property (b), A deed now necessary. it is provided that a feoffment, other than a feoffment made under a custom by an infant (c), shall be void at law, unless evidenced by deed. Where a deed is made Whether signing of deeds necessary. use of, it is a matter of doubt, whether signing, as well as sealing, is absolutely necessary: previously to the Statute of Frauds, signing was not at all essential to a deed, provided it were only sealed and delivered (d); and the Statute of Frauds seems to be aimed at transactions by parol only, and not to be intended to affect deeds. Of this opinion is Mr. Preston (e). Sir William Blackstone, on the other hand, thinks signing now to be as necessary as sealing (f). And the Court of Queen's Bench has, if possible, added to the doubt (g). Mr. Preston's, however, appears to be the better opinion (h). However this may be, it would certainly be most unwise

(z) Sect. 2.

(a) 8 Prest. Abst. 110.

(b) Stat. 8 & 9 Vict. c. 106, s.

3.

(c) *Ante*, p. 55.

(d) Shep. Touch. 56.

(e) Shep. Touch. 56, n. (24), Preston's ed.; 3 Prest. Abst. 61.

(f) 2 Black. Comm. 308.

(g) *Cooch v. Goodman*, 2 Q. B. 580, 597.(h) See *Taunton v. Poplar*, 6 Madd. 166, 187; *Aveline v. Whisson*, 4 Man. & Gran. 801; *Cherry v. Heming*, 4 Ex. 631, 636; *Laurie v. Lees*, 14 Ch. D. 249; 7 App. Cas. 19, 27; Sug. Pow. 284, 285, 8th ed.

to raise the question by leaving any deed sealed and delivered, but not signed.

Legal doubts. The doubt above mentioned is just of a class with many others, with which the student must expect to meet. Lying just by the side of the common highway of legal knowledge, it yet remains uncertain ground. The abundance of principles and the variety of illustrations to be found in legal text-books, are apt to mislead the student into the supposition, that he has obtained a map of the whole country which lies before him. But further research will inform him that this opinion is erroneous, and that, though the ordinary paths are well beaten by author after author again going over the same ground, yet much that lies to the right hand and to the left still continues unexplored, or known only as doubtful and dangerous. The manner in which our laws are formed is the chief reason for this prevalence of uncertainty. Parliament, the great framer of the laws, seldom undertakes the task of interpreting them, a task indeed which would itself be less onerous, were more care and pains bestowed on the making of them. But, as it is, a doubt is left to stand for years, till the cause of some unlucky suitor raises the point before one of the Courts ; till this happens, the judges themselves have no authority to remove it ; and thus it remains a pest to society, till caught in the act of raising a lawsuit. No wonder then, when judges can do so little, that writers should avoid all doubtful points. Cases, which have been decided, are continually cited to illustrate the principles on which the decisions have proceeded ; but in the absence of decision, a lawyer becomes timid, and seldom ventures to draw an inference, lest he should be charged with introducing a doubt.

Means of conveyance at common law. To return :—Besides a feoffment, there were certain means by which an estate of freehold could be conveyed

at common law, without livery of seisin; but none of without livery of seisin. these were available without actual entry upon the land. Thus fin⁽ⁱ⁾es and recoveries, which have been Fines and recoveries. already explained (ⁱ), were considered in the light of common assurances of freeholds. But these owed their force and effect to their being judicial proceedings. A fine, too, either presupposed seisin of the lands by the person to whom it was levied, or required to be followed up by entry on his part (^k). And recoveries used to be completed by a regular writ directing the sheriff to put the recoveror in possession of the lands (^l). So that in each case a transfer of possession was contemplated as notorious as that made by livery of seisin (^m). Again, Lease and release. if a freeholder in fee let his land to a tenant for years or at will, who entered into actual possession, only the mere right (ⁿ) of freehold and fee remained with the former; and this, being an incorporeal hereditament, was transferable at common law by deed (^o). In such a case, therefore, a freehold estate could be conveyed to the tenant by deed of release to him of all his landlord's estate in the land. But no such release could be effectually made to a tenant, who had not actually entered (^p). For the same reason an estate of freehold might be Confirmation. conveyed from a rightful owner to any one, who had obtained actual possession of his land, either with or without his privity, by deed of confirmation of the estate to him (^q). Also, if two men of equal estate Exchange. (*i.e.*, both seised in fee or tail) agreed to exchange lands, this might be completed at common law by entry without formal livery of seisin (^r). And a life-tenant in Surrender.

(i) *Ante*, pp. 68, 90—93.

(k) Co. Tr. 229, 230, 243, 261; Shep. Touch. 3, 4; 2 Black. Comm. 348—357; Cruise on Fines, ch. iii.

(l) Cruise on Recoveries, 151.

(m) See Cruise on Fines, 3, 6, 62, 63, 65, 158.

(n) *Ante*, pp. 5, 29.

(o) *Ante*, pp. 30, 31.

(p) Bract. fo. 40 a; Litt. ss. 459, 460, 465.

(q) Bract. fo. 40 b; Litt. ss. 515—591, 531—533.

(r) Litt. ss. 62—65; Co. Litt. 50, 51, 268 b. See stats. 29 Car. II. c. 3, s. 3; 8 & 9 Vict. c. 106, s. 3.

possession might *surrender* or give up his estate to the person next entitled to the freehold after his death without making formal livery (*s*).

No means of conveyance at common law without entry.

We see then that every mode of conveying a freehold known to the common law either required or presupposed a transfer of possession; and that no one could acquire an estate of freehold without entry on the land. In later times a method of conveyance was devised, which could be made use of at any distance from the property: but this derived its effect from the Statute of Uses (*t*). Before proceeding further, therefore, it will be necessary to explain that statute, and what it was designed to abolish, namely, equitable estates in land.

(*s*) Co. Litt. 337 b, 338 a; see 9 Vict. c. 106, s. 3.
 stats. 29 Carr. II. c. 3, s. 3; 8 & (*t*) Stat. 27 Hen. VIII. c. 10.

CHAPTER VII.

OF AN EQUITABLE ESTATE IN LAND.

SECTION I.

Of Equity and the Court of Chancery.

BESIDES the freehold estates in land, which may be enjoyed by the common law (*a*), a man may have valuable interests in land to which he is entitled, not at law, but in *equity* only. This word *equity*, when *Equity*. used, as here, in contra-distinction to law, does not refer to what is morally right as opposed to what is legal, but denotes generally the body of rules which has been developed in the exercise of the equitable jurisdiction of the Court of Chancery (*b*). These rules of equity are as much rules of positive law (*c*) as are the rules of common law; each body of rules is a part of the law of the land. The rules of equity, however, are of later origin. Like the equity of the Prætor in the Roman system (*d*), they were introduced to mitigate the harshness of a rigid legal system. In this country, however, they were not enforced in the same courts as the rules of law, but were administered in separate tribunals, the chief of which was the Court of Chancery. This Court gradually acquired complete power of carrying out its

(a) *Ante*, p. 9, n.

(b) Cf. Story, Eq. Jur. ch. i. §§ 25 *et seq.*

(c) I. e. rules enforced by a sovereign political authority; see Holland, Jurisprudence, 86, 87,

3rd ed.

(d) As to which see Gai. Comm. I. §§ 2, 8; Dig. I. i. 7. De *Justitia et Jure*; Maine's *Ancient Law*, ch. iii.; Moyle's *Justinian*, 27 *et seq.*

own decrees, even when they over-rode the rules of the common law; though the means adopted to secure obedience were not the same as were used to give effect to the judgments of common law courts. But, notwithstanding this difference in procedure, the rules of equity established in the Chancery Court became as binding on the subject, and as enforceable by the executive power of the State, as the rules of common law.

Origin of the equitable jurisdiction exercised in Chancery.

The jurisdiction of the Court of Chancery, like that of the common law courts (*e*), was derived from the authority of the King, regarded as the source of all justice within the realm. When Henry II. delegated his ordinary legal jurisdiction to judges sitting permanently (*f*), he reserved questions, which they could not determine, for the decision of himself and his council (*g*). To the King, therefore, and to his select council (*h*) petitions were constantly made for the redress of every kind of injustice, and especially for relief, as a matter of special grace and favour, in cases wherein no remedy could be had by the ordinary law (*i*).

A. D. 1848-9. About the twenty-second year of Edward III. petitions touching matters to be conceded of the royal grace were ordered to be prosecuted before the Chancellor; and it appears that after this petitions for the redress of grievances, which the common law failed to remedy, began to be addressed to the Chancellor instead of the King (*k*). After a statute of the 17th year of Richard II. (*l*) extending the Chancellor's jurisdiction, such petitions

(*e*) *Ante*, p. 9, n.

(*f*) *Ante*, p. 9, n.

(*g*) Benedict, *Gesta Hen. II.* i. 207; Stubbs, *Const. Hist.* ch. xiii. § 163.

(*h*) As to which, see Stubbs, *Const. Hist.* ch. xv. § 280; Hardy, *Introd. to Close Rolls*,

xxvi.

(*i*) See Stubbs, *Const. Hist.* ch. xv. § 281; Hardy, *Introd. to Close Rolls*, xxviii.

(*k*) Hardy, *Introd. to Close Rolls*, xxviii., xxix.

(*l*) Stat. 17 Ric. II. 6.

were regularly filed (*m*). Chancery process formed the subject of complaint by the Commons in the next three reigns (*n*); but in Edward the Fourth's time it is found established as a thing of use and wont (*o*). The equitable jurisdiction of the Court of Chancery was finally established by the decision in its favour by James I. of the controversy, whether a court of law could give relief after or against a judgment of a court of common law (*p*).

Chancery process was directed against the person ^{Chancery process.} complained of, who was summoned to appear and answer the matters laid to his charge (*q*); and, if need were, enjoined to refrain from exercising his common-law rights in a manner contrary to what the Court enforced as equity (*r*). Contempt of the Court's decree was punished by attachment (*s*) and imprisonment of the party in contempt, and in later times by sequestration (*t*) of his property. But it was only in Chancery that the rules of equity were enforced; for a title to relief in equity was never admitted to confer a *right* cognizable by the courts of common law (*u*). Chancery

(*m*) 1 Calendar of Proceedings in Chancery, preface.

(*n*) See Rot. Parl. iii. 471, 506, 510; iv. 84, 156, 189, 500.

(*o*) Hardy, *Introd. to Close Rolls*, xxxi.; Rot. Parl. vi. 144.

(*p*) See 8 Black. Comm. 52; Cary, 163; Jurisdiction of the Court of Chancery vindicated at the end of 1 Ch. Rep.

(*q*) See Hardy, *Introd. to Close Rolls*, xxx., note (3); Rot. Parl. iv. 84; Palgrave on the King's Council, 41; Calendar of Proceedings in Chancery, I. v., xxvii.

(*r*) Spence, *Eq. Jur.* 371, 673—6.

(*s*) *Clay v. Aldeburgh*, 2 Cal. lxii. (14 & 15 Edw. IV.).

(*t*) Sequestration appears to have been introduced in Elizabeth's reign, but hardly became an established institution before

the time of Charles II. See Practice of the High Court of Chancery (A. D. 1672) 25, 26; 1 Vern. 421; 1 Eq. Ca. Abr. 130; Prec. Ch. 552; Tothill, *Sequestration*; *Brograve v. Watts*, Cro. Eliz. 651; 1 Ch. Rep. 81; 1 Ch. Ca. 91; 2 Ch. Ca. 44, 45; Praxis Almæ Curis Cancellariæ (A. D. 1694), 32, 44, 89; Gilbert, *Forum Romanum*, 18, 68 *et seq.*; *ante*, p. 26, n. m.

(*u*) See Y. B. 4 Edw. IV. 8, pl. 9; *Warwick v. Richardson*, 10 M. & W. 284; Lewin on Trusts, ch. i, § 6, p. 16, 8th ed. A limited equitable jurisdiction was, however, conferred on the Common Law Courts by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 68, 69, 79, 83, 85).

Chancery
procedure.

procedure was borrowed from the Canon Law (*x*); and presented a strong contrast to common law procedure in its mode of trial by a single judge without a jury (*y*), its manner of taking evidence by the written depositions of witnesses examined by written interrogatories (*z*), and its decrees requiring the specific performance of the acts enjoined (*a*).

Principle of
equitable
relief.

At first the relief afforded under the Chancellor's extraordinary jurisdiction was no doubt based on moral grounds; equity was then identified with the rule of action prescribed by good conscience (*b*); and it was left to the discretion of the Chancellor how far he would interfere (*c*). But the respect paid to precedent and the practice of the Court (*d*), the professional opinion of regular practitioners at the Chancery Bar (*e*), the practice of deciding difficult cases with the advice of the judges (*f*), and the example of the Prætor's equity in Roman law (*g*), were all influences

(*x*) Gilbert, *Forum Roman.*, ch. ii. iii.; *Law Quarterly Review*, i. 182.

(*y*) 1 Spence, *Eq. Jur.* 388; 3 *Black. Comm.* 442, 450.

(*z*) 3 *Black. Comm.* 438, 449; 2 Maddock, *Chancery Practice*, 589, 3rd ed. Since 1852 evidence in Chancery proceedings may be taken *visâ voce*; see stat. 15 & 16 Vict. c. 86, ss. 28—30; Rules of the Supreme Court, 1883, Order xxxvii., r. 1.

(*a*) 1 Spence, *Eq. Jur.* 389, 390. Judgments at common law were, generally, either for the recovery of land, or of a sum of money, simply.

(*b*) See *Y. B. 4 Hen. VII.* 4, pl. 8; *Bro. Abr. Conscience*, pl. 8, 15, 17; *Doctor and Student*, Dial. I. ch. 12—19; *Bac. Tr.* iv. 305—307, 312, 324. In the Roman system, equity was identified with natural law, or the law which natural reason teaches all mankind; see *Maine's Ancient*

Law, ch. iii.; *Gai. Comm.* I. 1, 156, II. 65—78, III. 25.

(*c*) See Hardy, *Introd. to Close Rolls*, xxiii., xxxi.; *Lambard's Archeion*, 48, 64; *Abuses and Remedies of Chancery in Hargrave's Law Tracts*, 480, 431; *Seiden, Table Talk, Equity*; 3 *Black. Comm.* 54, 433, 434.

(*d*) See *Ordinacio Cancellariæ* 13 Ric. II.; *Renovacio Ordinum Cancellariæ*, *temp. Hen. V.*, *Sanders, Chancery Orders*, 1—7 d; Hardy, *Introd. to Close Rolls*, xxxi.

(*e*) *Renov. Ord. Canc.*, *Sanders, Ch. Ord.* 7 d.

(*f*) See *Y. B. 37 Hen. VI.* 18 & 35, pl. 23; 7 *Edw. IV.* 14, pl. 8; 22 *Edw. IV.* 6, pl. 13; 1 *Cal. xviii.*; 2 *Cal. xxviii.*

(*g*) Spence, *Eq. Jur.* i. 412, 415; see *Smyth, De Republica Anglorum*, 53, 54, ed. 1583; *Treatise of the Masters in Chancery*, § iv., in *Hargreave's Law Tracts*, 309—313; *History of the*

tending to make the Chancellor's interference with the law, in the name of equity, a matter of principle (*h*). Still, it was hardly until after the restoration of Charles II. that it became well understood that relief should be administered in a court of equity upon fixed principles of justice to be ascertained from precedents (*i*). Moreover, the practice of committing the Great Seal to a lawyer was not established before the seventeenth century (*j*). Indeed modern equity, the body of rules now enforced as equity, is generally dated from the Restoration, and may be said to have been evolved from the judgments given in the Court of Chancery from the Chancellorship of Lord Nottingham (*k*) down to that of Lord Eldon (*l*). By that time equity had become a body of case-law, administered on principles to be found in former decisions, but admitting no further accessions from the moral domain. Such it has since remained, notwithstanding a portentous increase in volume. Chancery procedure, of which the delays had become an intolerable scandal (*m*), was reformed in 1833 (*n*), and again in 1852 (*o*).

In 1875 the old Court of Chancery came to an end. ^{Judicature Acts of 1873-75.} In that year its original jurisdiction was by the Judicature Acts of 1873-75 transferred, together with that of the old courts of common law, to the High

Chancery, A.D. 1726, p. 40; Reeves, *Hist. Eng. Law*, ch. xxii. vol. ii., pp. 600, 601, ed. Finlason.

(*h*) Spence, *Eq. Jur.* i. 407 *et seq.*

(*i*) *Fry v. Porter*, 1 Mod. 307.

(*j*) The early Chancellors were mostly ecclesiastics, who, however, were then usually bred up in the study of the civil and canon law; see 8 Black. Comm. 53; Hardy's *Catalogue of Chancellors*; Reeves, *Hist. Eng. Law*, ch. xxvii. vol. ii., p. 600, ed. Finlason.

(*k*) A.D. 1678-1682. See 8 Black. Comm. 55; 1 Butler's *Reminiscences*, § 11; Story, *Eq. Jur.* § 52.

(*l*) Lord Chancellor, A.D. 1801-1806 & 1807-1827; see Maine's *Ancient Law*, ch. iii.

(*m*) See C. P. Cooper's *Letters sur la Cour de la Chancellerie*.

(*n*) By stat. 3 & 4 Will. IV. c. 94; *Orders in Chancery*, 21st Dec. 1833; 3 L. J. N. S. Ch. 1.

(*o*) By stat. 15 & 16 Vict. c. 86. See *First Report of the Chancery Commission*, 1852.

Court of Justice then established (*p*). The same Acts made provision for the recognition and enforcement of equitable rights in every branch of that Court, and in the Court of Appeal established at the same time (*q*); and also for the prevalence of the rules of equity, where conflicting with the rules of common law (*r*). For purposes of procedure, however, the administration of the principal matters, in which the Court of Chancery used to exercise its exclusive jurisdiction, and of the same Court's statutory jurisdiction, was assigned to the Chancery Division (*s*). Since 1875, therefore, *law* and *equity* have been administered in the same Court; and injunctions of a court of equity against proceeding at law are things of the past (*t*). The two systems of law and equity have not, however, been abolished, as some have imagined. For it is held that the effect of the Judicature Acts is not to change the nature of equitable as opposed to legal rights, but is to secure by the jurisdiction of one Court the same (but no greater) prevalence of equitable over legal rights as was formerly obtained by the action of the Court of Chancery against persons, who exercised their legal rights in violation of the rules of equity (*u*).

SECTION II.

Of Uses before the Statute of Uses.

Origin of
equitable
estates in
land.

Equitable estates in land have their origin in the

(*p*) Stats. 36 & 37 Vict. c. 66, s. 16; 37 & 38 Vict. c. 63; 38 & 39 Vict. c. 77.

(*q*) Stat. 36 & 37 Vict. c. 66, s. 24.

(*r*) Sect. 25, sub-s. 11.

(*s*) Stat. 36 & 37 Vict. c. 66, s. 84.

(*t*) See sect. 24, sub-s. 5; *Wright v. Redgrave*, 11 Ch. D.

24.

(*u*) See *Salt v. Cooper*, 16 Ch. D. 544, 549; see *Walsh v. Lonsdale*, 21 Ch. D. 9; *Clements v. Matthews*, 11 Q. B. D. 808; *Joseph v. Lyons*, 15 Q. B. D. 280; *Hallas v. Robinson*, *ib.* 288; *Furness v. Bond*, 4 Times L. R., 457; *Swain v. Ayres*, 21 Q. B. D. 289, 293.

ancient practice of men putting their trusted friends in possession of their lands, in confidence that their friends would dispose thereof according to their wishes (*x*). It appears that men gave their lands to others in trust, either for purposes, which were lawful but could not be carried out without the interposition of some person trusted to execute the donor's will, or for fraudulent purposes (*y*). As to the latter, men put others into legal possession of their lands in order to defraud their creditors (*z*), or to delay actions brought to recover the lands (*a*); and for a time gifts of land to trusted laymen to the use of religious houses were employed to evade the statute of Mortmain (*b*). The former kind of purpose is instanced by a gift of lands to others with intent to perform the donor's will, by disposing of the same according to his directions either in his lifetime or after his death. Thus, as a man could not convey to himself or his wife at common law (*c*), feoffments (*d*) were made to others in order to make a settlement of the land; as where one enfeoffed another with the intent that he should re-enfeoff the feoffor and his wife to hold to them and the heirs of their two bodies, and that a fine should be levied to effect the same purpose (*e*). It appears, too, that when freeholders could only dispose of their lands by delivering seisin thereof in their lifetime (*f*), they would enfeoff others, trusting the feoffees to dispose of the land according to the feoffor's last will after his death,

(*x*) As to the antiquity of this practice, see an article on Early English Equity in the Law Quarterly Review, vol. i., p. 162, by Mr. Justice O. W. Holmes, jun., of Mass. U. S. A.

(*y*) See Bacon on Uses, 8, 9, 20, 21.

(*z*) See stats. 50 Edw. III. c. 6; 2 Ric. II. st. 2, c. 3.

(*a*) See stat. 1 Ric. II. c. 9.

(*b*) *Ante*, p. 50, 72. This prac-

tice was stopped by stat. 15 Ric. II. c. 5.

(*c*) Bract. fo. 13, 29 a.

(*d*) *Ante*, p. 138.

(*e*) See Bract. fo. 262 a *Thomas of Weyland's case*, Rot. Parl. i. 66; Madox, Form. Angl. Nos. 126, 140, 165, 170, 372, 377, 378; Bro. Abr. Feoffment and Uses, pl. 9; F. N. B. 205 G. *Ante*, pp. 19, 70.

Ante, pp. 19, 70.

for instance, in paying his debts out of the profits, disposing of part for the benefit of his soul, or making estate thereof to his widow for life and afterwards to one of his sons in fee or in tail (*g*). Here the intent would also be that the feoffor should have the use of the land during his life (*h*). In course of time there grew up a practice (which seems to have been somewhat of a novelty in the reign of Edward I. (*i*), but to have been well-known in the time of Richard II.) of men putting their lands into the possession of several others jointly, or of others jointly with themselves, with the intent that the feoffees should dispose of the land according to the feoffor's will, and should hold the same, generally, for his use (*j*). This seems to have been done not only to gain the power of testamentary disposition, but also to escape the burdensome incidents of feudal tenure; for, so long as a plural number of feoffees was maintained, the survivorship prevailing between joint tenants (*k*) prevented the accrual of the lord's rights to relief, wardship and marriage (*l*), all forfeiture for treason or felony (*m*), and likewise wives' dower, an incumbrance ever sought to be evaded, as we shall, see (*n*). But for the feoffor to secure these advantages, it was of course necessary that the feoffees, whom he had trusted with the legal possession of his lands, should not abuse the confidence reposed in them. To ensure this result, it seems at first to have been usual for the feoffees to plight their faith to do the feoffor's will (*o*); as in early times a suit for breach of faith

1272
1377

(*g*) See Bract. fo. 41 b, "Et hoc non fit tantum inter vivos, sed etiam in ultima voluntate, dum tamen donator bonam habeat memoriam, sicut fieri solet inter vivos"; Abbrev. Placit. 272, col. 1, Suff. rot. 17; Rot. Parl. iii. 61; Madox, Form. Angl. Nos. 3, 107, 108, 768, 776; 1 Cal. xxi. xxv; 2 Cal. iii.
(*h*) Litt. s. 468.

(*i*) See *Thomas of Weyland's case*, Rot. Parl. i. 66.

(*j*) 1 Sand. Uses, 15—19.

(*k*) *Ante*, p. 182.

(*l*) *Ante*, p. 45.

(*m*) See Rot. Parl. i. 66; 1 Sand. Uses, 67.

(*n*) *Post*, Part I. ch. xiii.

(*o*) As to plighting faith, which still survives in the Church of England marriage service, and in

could be brought in the ecclesiastical courts (*p*). Such suits against laymen were, however, altogether prohibited in 1247 (*q*). Other checks upon feoffees in trust were also attempted (*r*), but proved insufficient when the obligation of good faith was without sanction (*s*). At length, in the reign of Henry V., if not earlier, relief against breach of trust was sought from the Chancellor (*t*). The application found favour with ecclesiastical Chancellors (*u*), accustomed to regard breach of faith as an offence against ecclesiastical law (*v*). And thenceforward the protection of Chancery process was extended to all who claimed the benefit or a gift of lands or goods to others in *trust* for the use of the donor or his nominees (*w*).

1461 In Edward the Fourth's reign the nature of a *use* (*x*) ^{Nature of a use.} (which signified the interest of one, to whose use others held lands) was pretty well settled. He, to whose use a feoffment was made (called *cestui que use*), was held to have no right to the land at law: all he had was the right to sue the feoffee in trust personally in Chancery (*y*). He enjoyed a similar right againsts

the word *affidavit*, see Law Quarterly Review, i. 164, 169, 178; Madox, Form. Angl. Nos. 2, 3, 84, 142, 147, 149, 151, 153—162, 630, 631, 674, 676, 688.

(*p*) Glanv. x. 12; 1 Roger de Hoveden, Rolls ed., 254; 2 R. de Diceto (*ibid.*), 87; 2 Matt. Paris. Chron. Maj. (*ibid.*), 368; Ann. de Burton (*ibid.*), 256, 406; Spence, Eq. Jur. i. 118.

(*q*) 4 Matt. Paris. Chron. Maj. 614; Ann. de Burton, 417, 423. See also Glanv. x. 12; Bract. 175 a, 401 b. It seems to have been common to submit by consent to ecclesiastical jurisdiction in matters of breach of faith or agreement; see Madox, Form. Angl. Nos. 157—159, 161, 630, 641, 685; Bract. 401, 406 b, 410 b, 411 a.

(*r*) *Viz.* conditions and covenants; see Law Quarterly Review, i., 168—170; Bract. 213 b; 17 Ass. pl. 20; 34 Ass. pl. 1; Litt. ss. 852—359; Madox, Form. Angl. Nos. 126, 165, 170.

(*s*) See Petition of Commons, Rot. Parl. iii. 511 (4 Hen. IV. No. 112).

(*t*) *Rothenhale v. Wyche*, 2 Cal. iii.

(*u*) *Ante*, p. 157 and n. (*j*).

(*v*) Spence, Eq. Jur. i. 442—444; Law Quarterly Review, i. 170, 173, 174.

(*w*) See 1 Cal. xxi., xxxv., xliii., xlvii., lxxviii., lxii., xc., xci., xciv.; 2 Cal. xix., xxi., xxiii., xxviii., xxxvi., xli., xlv., xlviii., li., lvi., lxi., lxvii.

(*x*) See Co. Litt. 272 b.

(*y*) Y. B. 4 Edw. IV. 8, pl. 9.

Notice of a
trust.

the feoffee's heir (z), or against his alienee, even for valuable consideration, who took the land with notice of the trust (a): but if the feoffee enfeoffed another of the land on a *bond fide* sale without notice of the use, *cestui que use* was without remedy to recover the land from the alienee, though he might sue the feoffee in Chancery for his breach of trust, and recover damages (b). And the feoffee in trust was bound in equity (that is, on pain of being subjected to the usual Chancery process (c) at suit of *cestui que use*) to allow him to take the profits of the land; to maintain actions at law at his request for the protection or recovery of the land (d); and to *execute the estate*, that is, to dispose of the land according to the directions of *cestui que use*, or to enfeoff him thereof, should he desire it (e). Uses might arise by express declaration, or by implication. If a feoffment of land were expressly declared to be made to any particular use or intent, that was to be strictly observed (f). If no use were declared, payment by the feoffee of any sum of money, however small, would raise a use (as it was said) in his favour (g). But if a feoffment were made without declaring any particular intent, and without any consideration (that is, without obtaining anything in return), it became a settled rule that it should be intended to have been made to the feoffor's own use (h). A use was also raised by a bargain for the sale of lands and payment of the purchase money, upon which the

(z) 2 Cal. xxviii.; Y. B. 8 Edw. IV. 6, pl. 1; Fitz. Abr. Age, 20, Subpœna, 14; Y. B. 22 Edw. IV. 6, pl. 18.

(a) Y. B. 5 Edw. IV. 7, pl. 16.

(b) Fitz. Abr. Subpœna, 19.

(c) *Anta*, p. 155.

(d) Y. B. 2 Edw. IV. 2, pl. 6; 7 Edw. IV. 29, pl. 15; see 1 Cal. xlviii.

(e) 1 Cal. xc., xciv., cxv., cxvi.; 2 Cal. xxi., xxii., xxviii.;

Bacon on Uses, 10.

(f) Y. B. 5 Edw. IV. pl. 20; see Fitz. Abr. Subpœna, 22.

(g) 1 Sand. Uses, 61, 62.

(h) See Y. B. 11 Hen. IV. 52, pl. 30; 5 Edw. IV. 8, pl. 20; Litt. ss. 463, 464. It may be inferred from this that it was a regular practice for men to entrust their lands to feoffees to their own use; Bacon on Uses, 21, 22.

Court of Chancery considered that in equity the seller immediately held the land sold to the buyer's use (i). A use was freely alienable without any formality, for *cestui que use* had but to declare his will concerning the land held to his use, and the feoffees were bound to fulfil it; so that he could always make a testamentary as well as any other disposition to the use of the land (k).

Though the feoffees to uses were bound in equity to allow *cestui que use* to have possession of the land, if he desired it, the Courts of Law would not recognize his possession as that of a legal freeholder (l), or as held otherwise than at the will of the feoffees (m). They considered that *cestui que use*, having but a mere right to sue the legal tenants in Chancery, had no estate in the land at law (n). In the Court of Chancery, however, although the interest of *cestui que use* was protected not by process against the land itself, but only by process against the trustee personally, it was nevertheless regarded as an estate in the land (o). As the feoffees were bound in equity to execute the estate at the will of *cestui que use* (p), he was considered in the Court of Chancery to be the true owner of the land, and to enjoy in equity such estate in the land as he would have had at law, if the estate had been executed to him by conveyance from the feoffees. Thus it came about that there might be, as it were, two estates in the same land, when it had been entrusted to feoffees to uses. There was the estate of the feoffees cognizable at common law—the legal estate; and there was the beneficial interest of *cestui que use*, not recognized at common law, but protected in equity and

(i) Gilb. Uses and Trusts, 49, 50 (94, 95, 3rd ed.).

(k) Bacon on Uses, 16; 1 Sand. Uses, 65.

(l) See Law Quarterly Review, 1, 167, 168.

(m) 1 Sand. Uses, 66 and note (i).

(n) Ante, pp. 7, 8, 60; 1 Rep. 121; Bacon on Uses, 5.

(o) 1 Sand. Uses, 64.

(p) Ante, p. 164.

treated in courts of equity as being a like estate in the *use* of the land, as he would have had in the land itself, if his feoffees had executed the estate to him.

SECTION III.

Of the Statute of Uses.

Incon-
veniences pro-
duced by
feoffments to
uses.

1453

The Statute
of Uses.

This system of entrusting the legal possession of lands to feoffees to uses, while *cestui que use* enjoyed actual possession thereof as apparent owner, was certainly advantageous to the latter, when once his interest was protected. But it afforded opportunities of defrauding purchasers and creditors; and, as we have seen (q), it infringed upon the interests of the lords and the Crown. In the reigns of Richard III. and Henry VII. statutes were passed for removing these abuses (r). But the remedies so applied appear to have proved insufficient; for in the next reign the Statute of Uses (s) was passed with the aim of entirely extirpating the evils of feoffments to uses. By this statute, after an elaborate rehearsal of all the evils which the authors of the statute conceived to have been caused by the practice of making feoffments to uses, it is enacted (t) that when any person or persons stand *seised* of any lands or other hereditaments to the *use, confidence or trust* of any other person or persons, the persons that have any such use, confidence or trust (by which was meant the persons beneficially entitled) shall be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they have in the use, trust or confidence; and that the *estate and possession*

(q) *Ante*, p. 160.

(r) See stats. 1 Ric. III. c. 1;
4 Hen. VII. c. 17; 19 Hen. VII.

c. 15; 1 Sand. Uses, 21, 52, 53.

(s) Stat. 27 Hen. VIII. c. 10.

(t) Sect. 1.

of the persons so seised shall be deemed to be in the persons so beneficially entitled after such manner as the latter were entitled in the use, trust or confidence. Like provision was made to meet the case, then common, of divers persons being seised of any hereditaments to the use of any of themselves (u). But shortly, the effect of the Statute of Uses is this: — If one or several be seised of any hereditaments to the use of another or others, or of one or more of themselves, the person or persons having the use of the same hereditaments shall be deemed to be in possession thereof for such estate as he or they has or have in the use. The statute in fact executes the estate (v) to *cestui que use*; that is, it gives him the same estate and possession at law as he would have if the feoffees to his use had executed the estate to him, or duly made to him a proper legal conveyance of the land. Thus, if A. and B. be seised of land in fee simple to the use of C. and his heirs, by the Statute of Uses, C. shall be deemed in lawful seisin of the land for such estate as he has in the use of the land, and the estate and possession of A. and B. shall be deemed to be in C. after such manner as C. was entitled in the use. C. thus by force of the statute becomes tenant in fee simple of the land at law; and he is deemed at law to be in possession of the land, though he may never have entered upon, or even seen it (x). And the estate and possession of A. and B. is altogether taken away from them, and considered at law to be in C. Similarly, if land be conveyed to A. and B. in fee simple to the use of A. and his heirs, the Statute of Uses at once gives to A. an estate in fee simple in

(u) Sect. 2. See *ante*, p. 160; Bacon on Uses, 49.

(v) *Ante*, p. 162.

(x) He is not, however, deemed to be in possession for the purpose of maintaining an action of trespass, which is founded on dis-

turbance of the actual possession of the land; 6th. Uses, 81 (186, 3rd ed.); 2 Fonb. Eq. 12; *Harrison v. Blackburn*, 17 C. B., N. S. 678. See *Anon. Cro. Eliz.* 46; *Heelis v. Blain*, 18 C. B., N. S. 90; *Hadfield's case*, L. R., 8 C. B., 306.

Resulting
use.

possession at law. And the law is the same of implied uses as of uses expressly declared. Thus if A., seised of land in fee simple, made a feoffment thereof to B. and his heirs, with due livery of seisin, but without consideration and without expressly declaring any use of the land, we have seen (y) that it was implied in law that A. should have the use of the land. But by the statute A. having the use of the land is deemed to have seisin of the land for the same estate as he has in the use; and all B.'s estate and possession is deemed to be in A. A. therefore, the feoffor, instantly gets back all he gave; and the use is said to result to himself. The propriety of inserting in every feoffment the words *to the use of*, as well as *to*, the feoffee is therefore manifest (z). The Statute of Uses is still in force; and though it has failed to impress the popular imagination as vividly as the *Habeas Corpus* Act (a), it forms one of the most important landmarks of real property law, and should be deeply graven on every conveyancer's heart. It will be observed that the statute made it possible to transfer the property in land from one to another by duly conveying the estate to a third party, to the use of the other. For directly the third party became seised of the land to the other's use, the Statute of Uses annexed the legal estate in the land to the estate in the use (b). This curious result of the statute remains law to this day, and, as we shall see, is constantly applied in practice. If, therefore, A. convey land to B. in fee simple to the use of C. and his heirs, B., to whom the land is given, now takes no estate therein at law, but C., in whose favour the use is declared, is at once invested with an estate in fee simple in land. The words *to the use of* are now almost universally employed when it is intended that an estate

(y) *Anie*, p. 162.

(z) *Anie*, p. 143.

(a) See Black. Comm. iii. 135,

iv. 488.

(b) *Anie*, p. 164.

in land shall vest in any person by force of the Statute of Uses: but "upon confidence" or "upon trust for" would answer as well, since all these expressions are mentioned in the statute.

SECTION IV.

Of Trusts after the Statute of Uses.

Estates in use, being turned into legal estates by the Statute of Uses, were withdrawn from the exclusive ^{Chancery jurisdiction over trusts re-established} jurisdiction of the Court of Chancery. Indeed, it is said that the main object of the designers of the statute was to effect the entire extirpation of equitable estates in land (c). But in this respect the statute failed to carry out its authors' purpose. For the active exercise of the Chancery jurisdiction over estates held in trust was very soon revived, and estates in equity only, since known as trust estates, again arose and have continued to the present day. These results were caused by the doctrine established in the courts of common law that there can be no use upon a use, or that when the statute has once transferred the legal estate in land to a person in whose favour a use is raised, it will have no further operation; so that no uses or trusts of the land in the hands of *cestui que use* will take effect as estates at law. This doctrine is based on a case occurring not long after the passing of the statute, where A. bargained and sold land to B. to the use of C., and B. paid the purchase money; when it was held that B., in whose favour a use was raised by such payment (d), took the legal estate by force of the statute, and that C. took no estate at all at law (e). This decision may have been founded simply on the principle that he, who paid the money,

(c) 1 Rep. 124, 125.

(d) *Ibid.*, p. 162.

(e) Bro. Abr. Feoffment and

Uses, 54; *Tyrrel's case*, Dyer, 155.

Special
trust.

should have the land: but there grew out of it the rule, that the first use only shall be executed by the statute, or that there shall be no use upon a use (f). This rule was applied equally to uses raised by express declaration, and is still law. If therefore land be conveyed to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, only the first use, that declared in B.'s favour, will be executed by the statute; that is to say, the statute will annex the legal estate to the first use, so that B. shall have the fee simple at law, but it will have no further operation; and C. will therefore take no estate at all at law (g). It was further held that, when land was conveyed to one, not simply to another's use, but for some special use or trust imposing an active duty on him, as to sell land or pay debts out of the profits, no estate could be executed by the statute, so as to deprive him of the legal ownership, without which he could not perform his trust (h).

Now there was nothing in the Statute of Uses to take away the established jurisdiction of the Court of Chancery to enforce trusts of property imposed on the person, who was the legal owner. The Act merely turned *cestui que use* into a legal freeholder, who had no occasion to resort to a court of equity for protection. And it does not appear that there was any intermission of this jurisdiction in the case of special trusts or of chattels (i). When therefore it was held that no trusts or uses declared concerning the land in the hands of the first *cestui que use* would be turned into legal estates by the statute, but that he alone should have all the estate at law, recourse was had to the Chancery jurisdiction to enforce such trusts or uses. The case fell within the same principle as had prevailed in originally

(f) See Gilb. Uses and Trusts, 247, n., 3rd ed.; Sug. Pow. 10.

(g) 1 Atk. 591.

(h) 1 Spence, Eq. Jur. 466; 1

Sand. Uses, 248 et seq.

(i) 1 Spence, Eq. Jur. 466, 467.

securing the enforcement of uses in equity, namely that Chancery process would issue against a person, who committed a breach of trust reposed in him with regard to property, of which he was the legal owner. And it became established accordingly that trusts should be equally enforced in equity, whether the trustee became possessed of the land by the operation of the Statute of Uses or without it (*k*). If, therefore, an estate in fee simple be conveyed to A. to the use of B. to the use of or in trust for C., though B. will become tenant in fee simple at law under the Statute of Uses, yet in equity he will be bound to hold the land and apply its profits for C.'s use; and C. will be considered to be in equity the owner of the land. In this way, equitable estates in land (*l*) were completely re-established. Here it may be noted that, since the above doctrines have become well established, it has not been the practice to employ the word *use* when intending to create a trust enforceable in equity. And it is usually expressed that lands shall be held *to the use* of any one, only when it is intended that he shall take the legal estate therein. To impose a trust, it is generally declared that the legal owner (he, to whose *use* the land is in the first place given) shall hold it *in trust* for the person or purposes desired.

An equitable or trust estate then is the name given Equitable to the interest of one, *in trust for* whom another holds estate. land as legal owner. In such a case the holder of the legal estate (*m*) in the land is called the trustee; while Trustee and the person beneficially entitled is called, in law French, *cestui que trust*, *trust*. The nature of a trust estate since the Statute of Uses is similar to that of a use of lands

(*k*) See *Foote v. Hopkins*, 2 Bulst. 336, 337; *Sandbach v. Dalton*, Tothill, pl. 168; 1 Atk. 591; Gilb. Uses and Trusts, 162; 1 Sand. Uses, 265, 266; 1 Spence, Eq. Jur. 490, 491.

(*l*) *Ante*, pp. 163, 164.

(*m*) *Ante*, p. 163.

before the statute (*n*). Thus trusts are still either special or simple (*o*). Of the special trust, where the trustee has an active duty to perform, as to sell lands and distribute the proceeds of sale among specified persons, no more need be said than that in such a case the estate is not executed by the Statute of Uses (*p*); and it is the trustee's duty to perform exactly the will of the person, who has created the trust, as declared at the time of its creation (*q*). In simple trusts, where one is a trustee of land for another simply, the trustee is bound, as in the case of the old uses (*r*), to maintain actions for the defence of the land, to allow *cestui que trust* to have possession and take the profits thereof, and, if the trust be for *cestui que trust* in fee simple, to convey the legal estate in the land as he shall direct, or to him, if he desire it (*s*). Furthermore, the nature of a trust estate remains the same. Strictly speaking, it is but a right against the trustee personally. It has been established, however, that the trust is so far annexed to the trustee's estate that, as a general rule, all persons, who acquire that estate, are bound by the trust. Thus the trust may be enforced against all persons who may take the trustee's estate by act of law or gratuitous conveyance from him; as his heirs, creditors and devisees (*t*). So purchasers having actual or constructive notice of the trust are bound by it (*u*). But if the trustee convey the trust estate to a *bona fide* purchaser for value, who has no notice of the trust, the latter will not be bound thereby; but will be entitled to retain and enjoy for his own benefit the legal ownership he has acquired from the trustee. For in such a

(*n*) 1 Sand. Uses, 286; Lewin on Trusts, ch. i.; *ante*, p. 161.

(*o*) Lewin on Trusts, ch. ii., 8th ed.

(*p*) *Ante*, p. 168; Lewin on Trusts, ch. xii. s. 1, § 2, 8th ed.

(*q*) See Lewin on Trusts, ch. xvii., xviii., xxiii. s. 1, § 3,

xxvi. s. 2, 8th ed.

(*r*) *Ante*, p. 162.

(*s*) Lewin on Trusts, 674, 684, 858, 8th ed.

(*t*) Lewin on Trusts, ch. xii. s. 3, 8th ed.

(*u*) Lewin on Trusts, ch. xxx., s. 1, § 1, 8th ed.

case *cestui que trust* has no *equity* against him; but can only sue the fraudulent trustee for his breach of trust under the Court's equitable jurisdiction (*x*). It is not until we examine this apparent exception to the rule that the nature of a trust estate is made plain. We then see that it is not a true right of ownership, enforceable against the land directly, without the intervention of another person's action, and maintainable against all other persons whomsoever, but is properly a mere obligation incumbent on the legal owner of land and enforceable against some but not all of those, who succeed to his estate (*y*). As has been already indicated, however (*z*); notwithstanding this liability of *cestui que trust* to be wrongfully deprived of his interest in the land by the fraudulent dealings of his trustee, he is considered to be in equity the owner of the land, *as against all persons bound by the trust*, and his beneficial interest is treated as being in equity an estate in the land (*a*). It may be remarked here that, since the Statute of Uses, it has not been the general practice of landowners to place their lands in the hands of trustees for themselves simply; as it was before that Act (*b*). The statute paved the way to the modern system of settlement (*c*); which is carried out by limiting successive estates in use to be executed by the statute as legal estates (*d*). In modern practice, trusts for sale and similar special trusts are more commonly created than simple trusts of land.

Trusts of property may be created by act of the parties or operation of law. Express trusts are created either by fully conveying the legal interest in the property to others on *trust* for the persons desired to

Creation of trusts.

(*x*) Lewin on Trusts, ch. xxx., s. 1, §§ 1, 3, 4 & s. 3, § 4, pp. 887—889, 894, 8th ed.

(*y*) See Lewin on Trusts, ch. i. (*z*) *Ante*, p. 168.

(*a*) See Lewin on Trusts, pp. 7—10, 674, 882, 8th ed.

(*b*) *Ante*, p. 160.

(*c*) *Ante*, pp. 95, 108.

(*d*) *Ante*, p. 165.

Implied
trusts.

Resulting
trusts.

be benefited, or, without any transfer of the legal ownership, by the owner declaring that he will hold the property on trust for them. When a declaration of trust has been duly made, either with or without a conveyance of the legal interest, the trust will be enforceable in equity, although no consideration (*e*) should have been given for its creation. But a mere voluntary covenant or promise to transfer property to another, made without any declaration of trust and not carried out by conveyance of the property at law, will not be specifically enforced in equity (*f*). Trusts may also be implied in certain cases, in which the acts of the parties shew an intention to create them. A sale of land is an instance of this, when the vendor is at once held to be trustee for the purchaser (*g*). But no trust will be implied from such a voluntary covenant or promise as has just been mentioned (*h*). Trusts are said to arise by operation of law in the following cases; when they are created by implication of equity without any expression in word or act of the parties' intention (*i*), that is to say: — (1) Where an owner conveys away his property at law, but it cannot be inferred that he intended to dispose of the beneficial interest therein; for instance, where property is conveyed in trust for purposes, which fail or do not exhaust the whole estate conveyed; or where one makes a gratuitous transfer of property at law, but no intention of gift can be inferred. (2) Where a purchaser of property takes a conveyance of the legal interest therein in the name of another, and there is nothing to shew that he intended the other to benefit. In these cases there is said to be a resulting trust in favour of the owner or purchaser (*j*).

(*e*) *Ante*, p. 74.
(*f*) Lewin on Trusts, ch. vi.,
8th ed.
(*g*) Lewin on Trusts, 108, 180
et seq., 8th ed.
(*h*) *Richards v. Delbridge*, L.

R., 18 Eq. 11; Lewin on Trusts,
ch. VI. 8th ed.
(*i*) Lewin on Trusts, 108, n.,
193, 8th ed.
(*j*) See Lewin on Trusts, ch. ix.,
8th ed.

(3) If a trustee use his position of legal owner to obtain some valuable interest in property for himself; when he will be held in equity to be a trustee thereof, constructively, for those for whose benefit he was entrusted with such legal ownership (*k*). Constructive trust.

In the regulation of trust estates and interests the Court of Chancery was generally guided by the principles applicable to estates and interests at law (*l*). Thus simple trusts created of real or personal property confer on *cestui que trust* an interest in equity of the nature of real or personal estate, as the case may be; so that *cestui que trust* of lands in fee simple has an estate in equity transmissible to his heirs, but his interest in chattels held on trust for him will pass to his executors or administrators (*m*). Again, trusts declared in favour of one and his heirs, or of him and the heirs of his body, or of him for life, will create equitable estates in fee simple, fee tail, or for life, analogous to the legal estates conferred by similar limitations (*n*). But the decisions of equity do not follow the law in all its ancient technicalities, but proceed on a liberal system correspondent with the more modern origin of its power. Thus, equitable estates in fee simple or tail may be conferred without the use of the words *heirs* or *heirs of the body*, if the intention be clear (*o*); for, equity pre-eminently regards the intentions and agreements of parties; accordingly,

(*k*) Lewin on Trusts, ch. x., 8th ed.

(*l*) 1 Sand. Uses, 269 (280, 5th ed.).

(*m*) *Ante*, pp. 18—21; see Lewin on Trusts, 94, 149, 285, 828, 5th ed.

(*n*) *Ante*, pp. 60, 62, 84, 105, 107, 141.

(*o*) Lewin on Trusts, ch. viii. s. 1, § 1, 8th ed. It appears, however, with regard to formal limitations in a deed of equitable

estates in land, that a limitation to one simply, without further words, and without otherwise expressing an intention that he shall take the fee, will give him a life estate only; *Holliday v. Overton*, 15 Beav. 480; *Lucas v. Brandreth*, 28 Beav. 274; *Tatham v. Vernon*, 29 Beav. 604; Lewin on Trusts, p. 109, 8th ed.; Elphinstone, Norton and Clark on Interpretation of Deeds, 276—8.

Equitable
estate tail in
lands to be
purchased.

Equitable
estate in fee
simple.

words which at law would confer an estate tail, are sometimes construed in equity, in order to further the intention of the parties, as giving merely an estate for life, followed by separate and independent estates tail to the children of the donee. This construction is frequently adopted by equity in the case of marriage articles, where an intention to provide for the children might otherwise be defeated by vesting an estate tail in one of the parents, who could at once bar the entail, and thus deprive the children of all benefit (*p*). So if lands be directed to be sold, and the money to arise from the sale be directed to be laid out in the purchase of other land to be settled on certain persons for life or in tail, or in any other manner, such persons will be regarded in equity as already in possession of the estates they are intended to have: for, whatever is fully agreed to be done, equity considers as actually accomplished. And in the same manner if money, from whatever source arising, be directed to be laid out in the purchase of land to be settled in any manner, equity will regard the persons on whom the lands are to be settled as already in the possession of their estates (*q*). And in both the above cases the estates tail directed to be settled may be barred, before they are actually given, by a disposition, duly enrolled, of the lands which are to be sold in the one case, or of the money to be laid out in the other (*r*). Again, an equitable estate in fee simple immediately belongs to every purchaser of freehold property the moment he has signed a contract for purchase, provided the vendor has a good title (*s*); and it is understood that the whole estate of the vendor is contracted for, unless a smaller estate is expressly men-

(*p*) 1 Sand. Uses, 311 (337, 5th ed.); Watkins on Descents, 168 (314, 4th ed.).

(*q*) 1 Sand. Uses, 300 (324, 5th ed.).

(*r*) Stat. 3 & 4 Will. IV. c. 74,

ss. 70, 71, repealing stat. 7 Geo. IV. c. 45, which repealed stat. 39 & 40 Geo. III. c. 56.

(*s*) Sug. Vend. & Pur., 174 *et seq.*, 14th ed.

tioned, the employment of the word *heirs*, or of other technical words, not being essential (*t*). If, therefore, the purchaser were to die intestate the moment after the contract, the equitable estate in fee simple, which he had just acquired, would descend to his heir at law; who would, until the passing of a recent Act which enacts the contrary (*u*), have had a right (to be enforced in equity) to have the estate paid for out of the money and other personal estate of his deceased ancestor; and the vendor would be a trustee for the heir, until he should have made a conveyance of the legal estate, to which the heir would be entitled. Many other examples of equitable or trust estates might be furnished.

At law, the possession of *cestui que trust* in occupa-
 tion of the land was merely that of a tenant at will to his trustees. Before the Judicature Acts, therefore, if he wished to have the benefit of a greater right to maintain or recover possession than is accorded to tenant at will (*x*), he must have directed his trustees to take action for him, and must have sued them in a court of equity for any breach of trust in this respect (*y*). But the effect of the Judicature Acts (*z*) appears to be that the equitable right to possession of land enjoyed by *cestui que trust* shall now be recognized and enforced in every branch of the Court, which now exercises the jurisdiction of the old Superior Courts both of law and equity (*a*).

As regards free enjoyment, an equitable tenant in fee
 Free enjoyment of *cestui que trust*.

(*t*) *Bower v. Cooper*, 2 Hare 408.

(*u*) Stat. 40 & 41 Vict. c. 34.

(*x*) See Bac. Abr. Trespass (C, 3); Cole on Ejectment, 211—213, 287; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

(*y*) *Doe d. Hodson v. Staple*, 2 T. R. 684; *Goodtitle d. Jones v.*

Jones, 7 T. R. 48; *Doe d. Reade v. Reade*, 8 T. R. 118; Lewin on Trusts, 677, 678, 853, 8th ed.

(*z*) *Ante*, p. 157.

(*a*) *Walsh v. Lonsdale*, 21 Ch. D. 9; *Furness v. Bond*, 4 Times L. R. 457; *Lowther v. Heaver*, 41 Ch. D. 248, 264.

Restrictions
on the use of
land in
equity.

or in tail has as ample a right as the tenant of a like estate at law (*b*): but an equitable tenant for life may be restrained from and is liable for committing waste to the same extent as a legal tenant for life (*c*). Here it may be explained that a tenant in fee simple at law may in equity be subject to perpetual restrictions in the use of his land imposed by his own agreement or that of his predecessors in title for the benefit of the owners and occupiers of some other land; for instance, not to build over part of his land, or not to use any house thereon as a public-house or hotel. Such an equity may be enforced by injunction at suit of such owners or occupiers against the tenant, his heirs and assigns, either of the whole or part of his estate, except only (as in the case of other equities (*d*)) such assigns as have acquired the land as purchasers for value without notice of the restriction (*e*).

Power of
disposition
of trust
estates.

Free power of disposition *inter vivos* or by will has always been incident to a trust estate, as it was to an estate in use before the statute (*f*). But this power is of course commensurate with the estate of the *cestui que trust*. Thus an equitable estate tail must be barred in the same manner as an estate tail at law; that is to say, since 1833, by deed duly enrolled (*g*), and previously by suffering a common recovery (*h*). So *cestui que trust* of lands for life only can dispose, for his own

(*b*) *Ante*, pp. 75, 108.

(*c*) *Baker v. Sebright*, 18 Ch. D. 179; *Lewin on Trusts*, 574, 8th ed.; *ante*, pp. 109—111.

(*d*) *Ante*, p. 170; see *Jessel, M. R.*, 20 Ch. D. 588; *Lord Esher, M. R.*, 16 Q. B. D. 787; *Lindley, L. J.*, *ib.* 788.

(*e*) See *Tulk v. Moxhay*, 2 Ph. 774; *Kenals v. Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866; *Tate v. Gosling*, 11 Ch. D. 278; *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750; *Spicer v. Martin*,

14 App. Cas. 12; *Mackenzie v. Childers*, 43 Ch. D. 265; *Sug. V. & P.* 596, 14th ed.; see *Duke of Bedford v. Trustees of British Museum*, 2 My. & K. 552; *Sayers v. Collyer*, 28 Ch. D. 108.

(*f*) *Ante*, p. 163; *Lewin on Trusts*, ch. xxvii. ss. 1, 2.

(*g*) Stat. 3 & 4 Will. IV. c. 74, ss. 1, 15, 40.

(*h*) *Cruise on Recoveries*, 271; *Lewin on Trusts*, ch. xxvii. s. 1, §§ 5, 6; *ante*, pp. 92—95.

benefit, of no greater interest than during his own life. But any person, who is beneficially entitled in possession to an equitable estate in land during his life, now has the powers of leasing, sale and other powers given to a tenant for life by the Settled Land Act, 1882 (*i*); to give effect to which, he is empowered, equally with the tenant of a legal life estate, to convey the settled land for all the estate, which is the subject of the settlement (*k*). Trust estates are now liable to involuntary alienation for debt, equally with legal estates; as will be further explained in treating of creditors' rights (*l*). Alienation
for debt.

Trusts or equitable estates may be created and passed from one person to another, without the use of any particular ceremony or form of words (*m*). But, by the Statute of Frauds (*n*), it is enacted (*o*), that no action shall be brought upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. It is also enacted (*p*), that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing; and further (*q*), that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning Creation and
transfer of
trust estates.

Statute of
Frauds.

(*i*) Stat. 45 & 46 Vict. c. 88, s. 2, sub-ss. 5, 10 (*i*); *ante*, pp. 114—118.

(*k*) Sect. 20; *ante*, p. 118

(*l*) *Post*, Pt. I., ch. xi.

(*m*) 1 Sand. Uses, 815, 816 (848, 844, 5th ed.); Lewin on Trusts, ch. v., s. 1.

(*n*) 29 Car. II. c. 8.

(*o*) Sect. 4; Sug. V. & P. c. 4, pp. 121 *et seq.*, 14th ed.

(*p*) Sect. 7; *Tierney v. Wood*, 19 Beav. 380; *Dye v. Dye*, 13 Q. B. D. 147.

(*q*) Sect. 9.

the same, or by his last will. Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law, and trusts transferred or extinguished by an act or operation of law, are exempted from this statute (*r*). In the transfer of equitable estates it is usual, in practice, to adopt conveyances applicable to the legal estate; but this is never necessary (*s*). If writing is used, and duly signed, in order to satisfy the Statute of Frauds, and the intention to transfer is clear, any words will answer the purpose (*t*).

Descent of equitable fee.

Formerly, no escheat of a trust estate.

Law of escheat now applies to trust estates.

The descent of an equitable fee upon intestacy follows the same course as that of a legal fee (*u*); and, therefore, in the case of gavelkind and borough-English lands (*x*), trusts affecting them will descend according to the descendible quality of the tenure (*y*). Formerly, an equitable estate in fee did not escheat to the lord upon failure of heirs of the *cestui que trust* (*z*), for a trust is a mere creature of equity, and not a subject of tenure. In such a case, therefore, the trustee held the lands discharged from the trust which had so failed; and accordingly had a right to receive the rents and profits without being called to account by any one. In other words, the lands were thenceforth his own (*a*). But from and after the passing of the Intestates' Estates

(*r*) Sect. 8; see *ante*, p. 172.

(*s*) 1 Sand. Uses, 342 (377, 5th ed.); Lewin on Trusts, ch. xxvii. s. 1, § 8.

Stamp Duty.

(*t*) Agreements, as a rule, now bear a stamp duty of sixpence, which may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed. Declarations of trust of any property made by any writing, not being a will, or an instrument chargeable with *ad valorem* duty as a settlement, are charged with a stamp duty of 10s.; see stat. 54 & 55 Vict. c. 89, ss. 1, 7, 8, 22, &

1st schedule, replacing stat. 33 & 34 Vict. c. 97, s. 36 & schedule.

(*u*) *Ante*, p. 81, and *post*, ch. ix.

(*x*) *Ante*, pp. 55, 57.

(*y*) 1 Sand. Uses, 270 (283, 5th ed.); Lewin on Trusts, ch. xxvii., s. 11.

(*z*) 1 Sand. Uses, 288 (302, 5th ed.).

(*a*) *Burgess v. Wheats*, 1 Wm. Black. 123; 1 Eden, 177; *Taylor v. Haygarth*, 14 Sim. 8; *Davall v. New River Company*, 3 De Gex & Smale, 394; *Beale v. Symonds*, 16 Beav. 406; *Gallard v. Hawkins*, 27 Ch. D. 298.

Act, 1884 (b), where a person dies without an heir and intestate (c) in respect of any real estate consisting of any equitable estate or interest in any corporeal or incorporeal hereditament, the law of escheat shall apply in the same manner as if such estate or interest were a legal estate in corporeal hereditaments (d). Before the ^{Treason.} abolition of forfeiture for treason, it was the better opinion that, in the event of high treason being committed by the *cestui que trust* of an estate in fee simple, his equitable estate would be forfeited to the Crown (e).

Trustees, as we have seen (f), are invariably made ^{Descent of} joint tenants. So that, if there are more trustees than ^{estate of} one, upon the death of one of them the estate in any land subject to the trust vests at once in the surviving trustees or trustee. Formerly, upon the death of a sole or sole surviving trustee of lands, the legal estate therein passed to his devisee or heir at law, according as he had or had not devised the same by his will, in each case subject to the trust (g). But now, by the Conveyancing Act of 1881, on the death after the year 1881 of a sole trustee of any freehold estate or interest of inheritance in any hereditaments, the same shall, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives, in like manner as if the same were a chattel real (h). It was ^{Failure of} never precisely decided, whether, in case of the failure ^{heirs of} of heirs of the trustee of an estate in fee simple, the lord taking the land by escheat (i) was bound by the

(b) Stat. 47 & 48 Vict. c. 71, s. 4; passed 14th August, 1884.

(c) See sect. 7.

(d) See *ante*, pp. 46, 52.

(e) 1 Hale, P. C. 249; *ante*, pp. 46, 52.

(f) *Ante*, p. 182.

(g) See Williams's Conveyancing Statutes, 171. On the death of a bare trustee intestate between the 7th Aug., 1874, and the 31st

Dec., 1881, any hereditament of which he was seised in fee simple vested in his legal personal representative; stat. 38 & 39 Vict. c. 87, s. 48.

(h) Stat. 44 & 45 Vict. c. 41, s. 30, amended by 50 & 51 Vict. c. 73, s. 45; see Williams's Conveyancing Statutes, 170—176; *Re Pilling's Trusts*, 28 Ch. D. 432.

(i) *Ante*, p. 46, 52.

trust; for he did not succeed to the trustee's estate, but claimed by title paramount (*j*). But, since 1834, both the lord's right of escheat and the Crown's right of forfeiture have been taken away by statute in the case of the failure of heirs or corruption of the blood of a trustee of lands; except so far as he himself might have any beneficial interest in such lands (*k*).

Appointment
of new
trustees.

When lands are vested in trustees, it is obvious that it may become desirable to appoint new trustees in the place of any, who may die, leave the country or become incapable of acting in the trust, or in other events. Formerly this could only be done with the concurrence of all the *cesteux que trustent* being *sui juris*, or under the authority of the Court of Chancery (*l*), or by virtue of an express power to appoint new trustees contained in the instrument, by which the trust was created (*m*). As trusts were generally instituted for the benefit of married women and children, who, as we shall see (*n*), were not *sui juris*, it was the practice, until the year 1860, to insert such an express power in every well-drawn deed or will creating a trust (*o*). In 1860, an

(*j*) See Lewin on Trusts, Introd. ch. i. § 4, and ch. xii. s. 3, § 7.

(*k*) Stat. 13 & 14 Vict. c. 60, ss. 15, 46, 47, replacing 4 & 5 Will. IV. c. 28.

Appointment
of new
trustees by
the Court.

(*l*) New trustees might always be appointed by the Court of Chancery, under its general jurisdiction to execute trusts, upon the institution of a *suit* for that purpose: *Howard v. Rhodes*, 1 Keen, 581; *Coventry v. Coventry*, *ib.* 758; *Dodkin v. Brunt*, L. R., 6 Eq., 580. The Trustee Acts, 1850 and 1852, empowered that Court to make an order appointing new trustees, upon *petition*; stat. 13 & 14 Vict. c. 60, s. 32; 15 & 16 Vict. c. 55, s. 9; and this jurisdiction may now be exercised by a judge in chambers on *summons*; Rules of the Supreme Court, June 1889, Order LV. rule 13 a; W. N., 29th June, 1889. The Court may appoint a new trustee in the place of a trustee convicted of felony, or adjudged bankrupt; stat. 15 & 16 Vict. c. 55, s. 9; 46 & 47 Vict. c. 52, s. 147. Since 1860, trustees appointed by the Court have had the same powers in all respects as the original trustees; stat. 44 & 45 Vict. c. 41, s. 33, replacing 23 & 24 Vict. c. 145, s. 27; Williams's Conveyancing Statutes, 181.

(*m*) See Lewin on Trusts, ch. iii., pp. 228, 721, 8rd ed.; Williams on Real Property, 176, 13th ed.

(*n*) *Idem*, ch. xii.

(*o*) Davidson, Prec. Conv. vol.

Act passed giving a statutory power to appoint new trustees, which, however, was applicable only in case of instruments executed after the Act (*p*). These enactments were repealed by the Conveyancing Act of 1881 (*q*), which has substituted provisions for the appointment of new trustees applicable to trusts created either before or after its commencement (*r*). Under this Act (*s*), where a trustee is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee (*t*) for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint a new trustee or new trustees. Every new trustee so appointed is at once invested with the same powers as an original trustee (*u*). On an appointment of a new trustee, the number of trustees may be increased (*x*). It is not obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but in the latter case, there must be at least two trustees to perform the trust (*y*).

(*p*) Stat. 23 & 24 Vict. c. 145, ss. 27, 34; passed 28th Aug. 1860.

(*q*) Stat. 44 & 45 Vict. c. 71, s. 71.

(*r*) Sect. 81, sub-s. 8. These provisions may be excluded or varied by the terms of the instrument creating the trust; see sub-s. 7.

(*s*) Sect. 81, sub-s. (1); see Williams's Conveyancing Statutes, 177 *et seq.*

(*t*) Including a refusing or retiring trustee, if willing to act in appointing a new one; s. 81, sub-s. (6).

(*u*) Sect. 81, sub-s. (5).

(*x*) Sect. 81, sub-s. (2).

(*y*) Sect. 81, sub-s. (3). An appointment of a new trustee is charged with a stamp duty of 10s.; stat. 54 & 55 Vict. c. 39, s. 1, & 1st schedule, replacing 33 & 34 Vict. c. 97, schedule.

Retirement of trustee.

Formerly a trustee could only retire and be discharged from a trust once accepted — (1) with the concurrence of all the *cestuaries que trustent* being *sui juris*; (2) under the authority of the Court of Chancery; or (3) by the appointment under an express or statutory power of a new trustee in his place (2). But now, by the Conveyancing Act of 1881 (a), where there are *more than two* trustees, a trustee may retire and be discharged from the trust, without any new trustee being appointed in his place, upon his declaring by deed his desire to be discharged, and his co-trustees, and such other person, if any, as may be empowered to appoint trustees, consenting by deed to his discharge.

Vesting trust property in new trustees.

The mere appointment of a new trustee does not give him the legal estate in the lands subject to the trust; and it was formerly necessary for the persons who were trustees when the appointment was made, to execute a conveyance of their estate in any land subject to the trust to the new trustee and the continuing trustees (b). In deeds of appointment of a new trustee and of discharge of a retiring trustee executed after the year 1881, the estate in any land subject to the trust may be vested in the future trustees simply by a declaration to that effect made by the proper persons without any conveyance (c). For, by the Conveyancing Act of 1881 (d), where a deed by which a new trustee is appointed contains a declaration *by the appointor* to the effect that any estate or interest in any land subject to the trust shall vest in the persons who by virtue of the deed become and are the trustees for performing the

May be now made simply by a declaration.

(a) See Lewin on Trusts, ch. xxv., 8th ed.

(b) Stat. 44 & 45 Vict. c. 41, s. 32, the provisions of which may be excluded or varied by the terms of the instrument creating the trust; see sub-s. 3.

(c) See Williams's Conveyancing Statutes, 181, 182.

(d) Stat. 44 & 45 Vict. c. 41, s. 34, sub-s. (5); see Williams's Conveyancing Statutes, 181—185.

(e) Sect. 34, sub-s. (1).

trust, that declaration shall, without any conveyance, operate to vest that estate or interest in those persons as joint tenants and for the purposes of the trust. And where a deed, by which a retiring trustee is discharged under the same Act, contains a similar declaration *by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees*, that declaration shall, without any conveyance, operate to vest in the continuing trustees alone as joint tenants, and for the purposes of the trust, the estate and interest to which the declaration relates (e).

It is not always possible to obtain the concurrence of the person entitled to the legal estate in land subject to a trust, when it is wished to vest the estate in new trustees. Provision has, therefore, been made by the Trustee Acts, 1850 and 1852 (f), that in certain cases an order of Court may be made vesting any lands subject to a trust in such persons and for such estate as shall be directed. Such an order may be obtained if the person seised or possessed of lands on trust be a lunatic, or an infant, or out of the jurisdiction or not to be found, or refuse to convey, and in one or two other cases; and the order has the effect of a conveyance (g). It must now be made, in the case of lunacy, by the Judge in Lunacy (h); in other cases, in the

Vesting
orders.

(e) Stat. 44 & 45 Vict. c. 41, s. 84, sub-s. (2). The 84th section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust; sub-s. (3). A conveyance of property made for effectuating the appointment of a new trustee is charged with a stamp duty of 10s.; see stat. 54 & 55 Vict. c. 89, s. 62, replacing 83 & 84 Vict. c. 97, s. 78; *Hadgett v. Commissioners of*

Inland Revenue, 3 Ex. D. 46; *ante*, p. 178, n. (i).

(f) Stats. 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55; replacing stats. 11 Geo. IV. & 1 Will. IV. c. 60, 4 & 5 Will. IV. c. 28, and 1 & 2 Vict. c. 69.

(g) See stats. 13 & 14 Vict. c. 60, ss. 3, 7—16, 20; 15 & 16 Vict. c. 55, s. 2. The order is chargeable with stamp duty as a conveyance; stat. 15 & 16 Vict. c. 55, s. 18; *ante*, note (e).

(h) See stat. 53 Vict. c. 5,

County
Courts.

Chancery Division (i). A similar order may be made, vesting lands in the future trustees, on or after an appointment of new trustees by the Court (k). Since 1865, the County Courts have had the jurisdiction of the Court of Chancery to enforce the execution of trusts and, under the Trustee Acts, in cases concerning trust property to the value of £500 (l).

Legal estate.

It remains to add that, though the Judicature Acts provided for the direct recognition and enforcement of equitable rights in the courts thereby established, which are courts of law as well as of equity (m), they have not altered the nature of an equitable estate (n). The terms *legal* and *equitable* estate are still in use; and the legal estate in lands may still be vested in some other person than the beneficial owner. Every purchaser of landed property has, therefore, a right to a good title both at law and in equity; and if the legal estate should be vested in a trustee, or any person other than the vendor, the concurrence of such trustee or other person must be obtained for the purpose of vesting the legal estate in the purchaser, or, if he should please, in a new trustee of his own choosing. When a person has an estate at law, and does not hold it subject to any trust, he has of course the same estate in equity, but without any occasion for resorting to its aid. To him, therefore, the doctrine of trusts does not apply: his legal title is sufficient; the law declares the nature

ss. 135, 342; Rules in Lunacy, 1890, Nos. 55—57; W. N. 26th July, 1890.

(i) *Ante*, p. 158. But such orders may be made as to lands in the counties of Lancaster or Durham, by the Chancery Courts of those counties; stat. 13 & 14 Vict. c. 60, s. 21.

(k) Stat. 13 & 14 Vict. c. 60, s. 84; *ante*, p. 180, n. (l).

(l) Stats. 28 & 29 Vict. c. 99, s. 1; 30 & 31 Vict. c. 142, s. 9, now replaced by 51 & 52 Vict. c. 48, s. 67.

(m) *Ante*, pp. 157, 158.

(n) *Clements v. Matthews*, 11 Q. B. D. 808, 814; *Joseph v. Lyons*, 15 Q. B. D., 280; *Hallas v. Robinson. ib.*, 288; see *ante*, pp. 170, 171.

and incidents of his estate, and equity has no ground for interference (o).

We shall now take leave of equity and equitable estates, and proceed, in the next chapter, to explain a modern conveyance.

(o) See *Brydges v. Brydges*, 8 Ves. 127.

CHAPTER VIII.

OF A MODERN CONVEYANCE.

Lease and
release.

IN modern times, down to the year 1841, the kind of conveyance employed, on every ordinary purchase of a freehold estate, was called a lease and release; and for every such transaction, two deeds were always required. From that time to the year 1845, the ordinary method of conveyance was a release merely, or, more accurately, a release made in pursuance of the Act (a) for rendering a release as effectual as a lease and release. The object of this Act was merely to save the expense of two deeds to every purchase, by rendering the lease unnecessary. Since 1845 freeholds have been transferable by deed of grant alone (b). But as a lease and release was so long the usual method of conveyance, the nature of a conveyance by lease and release should still form a subject of the student's inquiry; and with this we will accordingly begin.

Release.

A lease for
years.

It has been already explained (c) that, in the view of the early law, a lease of land for a term of years was a matter of contract rather than of transfer of property; and, for the purpose of an action for the recovery of the land, the possession of the lessee was that of a mere bailiff for his lessor, who remained seised of the freehold. Still, after a lessee for years had actually entered into possession of the land under his lease—and entry, in ancient times, was absolutely necessary to make a

(a) Stat. 4 & 5 Vict. c. 21, now repealed by stat. 37 & 38 Vict. c. 96.

(b) Stats. 7 & 8 Vict. c. 76, ss. 2, 18; 8 & 9 Vict. c. 106, s. 2.

(c) *Ante*, pp. 16, 17, 22, 60.

complete lease (*d*)—the relative position of the parties was substantially altered. The lessor's proprietary interest in the land, though technically it remained a freeholding, was divorced from actual possession; thus it became a mere right, an incorporeal hereditament (*e*). If, therefore, the lessor wished to transfer his proprietary right to the lessee, a feoffment with livery of seisin would have been out of place between them; for the essential part of this mode of assurance was the transfer of actual possession made by the livery of seisin; and it was impossible to transfer to the lessee the actual possession which he already enjoyed (*f*). In this case it is obvious that the end desired was the transfer of a right to land, without the possession of anything corporeal; and, as we have seen, the common law required this to be accomplished by the delivery of a sealed writing, that is, by deed (*g*). And a deed by which a freeholder conveyed all his estate in land to one, who was in actual possession thereof with his privity, was termed a release (*h*). To a lease and A release. release of this kind, it is obvious that the same objection applies as to a feoffment: the inconvenience of actually Inconvenience of lease with entry. going on the premises is not obviated; for the tenant must enter before he can receive the release. In the very early periods of our history, this kind of circuitous conveyance was, however, occasionally used. A lease was made for one, two, or three years, completed by the actual entry of the lessee for the express purpose of enabling him to receive a release of the inheritance, which was accordingly made to him a short time afterwards. The lease and release, executed in this manner, transferred the freehold of the releasor as effectually as if it had been conveyed by feoffment (*i*). But a lease

(*d*) Litt. s. 459; Co. Litt. 270 a.

(*e*) See *ante*, pp. 5, 29.

(*f*) Litt. s. 460; Gilb. Uses and Trusts, 104 (228, 8rd ed.).

(*g*) *Ante*, pp. 80, 81.

(*h*) Litt. ss. 444—461; Co. Litt. 270 b, 271 a.

(*i*) 2 Sand. Uses, 61 (74, 5th ed.).

and release would never have obtained the prevalence they afterwards acquired had not a method been found out of making a lease, without the necessity of actual entry by the lessee.

The Statute
of Uses.

Bargain and
sale.

The Statute of Uses (*k*) was the means of accomplishing this desirable object. This statute, it may be remembered, enacts, that when any person is seised of lands to the use of another, he that has the use shall be deemed in lawful seisin and possession of the lands, for the same estate as he has in the use. Now we have seen (*l*) that, before the Statute of Uses, if a bargain were made for the sale of an estate, and the purchase-money paid, but no feoffment were executed to the purchaser, the Court of Chancery considered that the estate ought in conscience immediately to belong to the person who paid the money, and, therefore, held the bargainor or vendor to be immediately seised of the lands in question *to the use* of the purchaser (*m*). This proper and equitable doctrine of the Court of Chancery had rather a curious effect when the Statute of Uses came into operation; for, as by means of a contract of this kind the purchaser became entitled to the *use* of the lands, so, after the passing of the statute, he became at once entitled, on payment of his purchase-money, to the lawful seisin and possession: or rather, he was deemed really to have, by force of the statute, such seisin and possession, so far at least as it was possible to consider a man in possession, who in fact was not (*n*). It, consequently, came to pass that the seisin was thus transferred from one person to another, by a mere *bargain and sale*, that is, by a contract for sale and payment of money without the necessity of a feoffment,

(*k*) 27 Hen. VIII. c. 10.

(*l*) *Ante*, pp. 162, 163.

(*m*) 2 Sand. Uses, 43 (58, 5th

ed.); Gilb. Uses and Trusts, 49 (94, 3rd ed.).

(*n*) *Ante*, p. 165 & n. (*x*).

or even of a deed (*o*); and, moreover, an estate in fee simple at law was thus duly conveyed from one person to another without the employment of the technical word *heirs*, which before was necessary to mark out the estate of the purchaser; for it was presumed that the purchase-money was paid for an estate in fee simple (*p*); and as the purchaser had, under his contract, such an estate in the *use*, he of course became entitled, by the very words of the statute, to the same estate in the legal seisin and possession.

The mischievous results of the statute, in this particular, were quickly perceived. The notoriety in the transfer of estates, on which the law had always laid much stress, was at once at an end; and it was perceived to be very undesirable that so important a matter as the title to landed property should depend on a mere verbal bargain and money payment, or *bargain and sale*, as it was termed. Shortly after the passing of the Statute of Uses, it was accordingly required by another Act of Parliament (*q*), passed in the same year, that every bargain and sale of any estate of inheritance or freehold should be made by deed indented and enrolled, within six months (which means lunar months) from the date, in one of the Courts of Record at Westminster, or before the *custos rotulorum* and two justices of the peace and the clerk of the peace for the county in which the lands lay, or two of them at least, whereof the clerk of the peace should be one. A stop was thus put to the secret conveyance of estates by mere contract and payment of money. For a deed entered on the

Bargains and sales required to be by deed enrolled.

(*o*) Dyer, 229 a; Comyns' Digest, tit. Bargain and Sale (B. 1, 4); Gilb. on Uses and Trusts, 87, 271 (172, 475, 3rd ed.).

(*p*) Gilb. Uses, 62 (116, 3rd ed.).

(*q*) 27 Hen. VIII. c. 16. Deeds

of bargain and sale may now be enrolled in the Central Office of the Supreme Court; *stats.* 36 & 37 Vict. c. 66, ss. 16, 77; 42 & 43 Vict. c. 78; Rules of the Supreme Court, 1883, Order LXI., rule 9.

A loophole
discovered in
the statute.

Bargain and
sale for a year.

Lease and
release.

records of a court is of course open to public inspection ; and the expense of enrolment was, in some degree, a counterbalance to the inconvenience of going to the lands to give livery of seisin. It was not long, however, before a loophole was discovered in this latter statute, through which, after a few had ventured to pass, all the world soon followed. It was perceived that the Act spoke only of estates of *inheritance or freehold*, and was silent as to bargains and sales for a mere term of years, which is not a freehold. A bargain and sale of lands for a year only was not therefore affected by the Act (*r*), but remained still capable of being accomplished by word of mouth and payment of money. The entry on the part of the tenant, required by the law (*s*), was supplied by the Statute of Uses ; which, by its own force, placed him in legal intendment in possession for the same estate as he had in the use, that is, for the term bargained and sold to him (*t*). And as any pecuniary payment, however small, was considered sufficient to raise a use (*u*), it followed that if A., a person seised in fee simple, bargained and sold his lands to B. for one year in consideration of ten shillings paid by B. to A., B. became, in law, at once possessed of an estate in the lands for the term of one year, in the same manner as if he had actually entered on the premises under a regular lease. Here, then, was an opportunity of making a conveyance of the whole fee simple, without livery of seisin, entry or enrolment. When the bargain and sale for a year was made, A. had simply to release by deed to B. and his heirs his (A.'s) estate and interest in the premises, and B. became at once seised of the lands for an estate in fee simple. This bargain and sale for a year, followed by a release, is the modern

(*r*) Gilb. Uses, 98, 296 (214, 502, 3rd ed.); 2 Sand. Uses, 68 (75, 5th ed.).
(*s*) *Ante*, pp. 151, 186.

(*t*) Gilb. Uses, 104 (222, 3rd ed.).
(*u*) 2 Sand. Uses, 47 (57, 5th ed.).

conveyance by *lease and release*—a method which was first practised by Sir Francis Moore, serjeant-at-law, at the request, it is said, of Lord Norris, in order that some of his relations might not know what conveyance or settlement he should make of his estate (*x*); and although the efficiency of this method was at first doubted (*y*), it was, for more than two centuries, the common means of conveying lands in this country. It will be observed that the bargain and sale (or lease as it is called) for a year derived its effect from the Statute of Uses; the release was quite independent of that statute, having existed long before, and being as ancient as the common law itself (*z*). The Statute of Uses was employed in the conveyance by lease and release only for the purpose of giving to the intended releasee, without his actually entering on the lands, such an estate as would enable him to receive the release. When this estate for one year was obtained by the lease, the Statute of Uses had performed its part, and the fee simple was conveyed to the releasee by the release alone. The release would, before the Statute of Uses, have conveyed the fee simple to the releasee, supposing him to have obtained that possession for one year, which, after the statute, was given him by the lease. After the passing of the Statute of Frauds (*a*), it became necessary that every bargain and sale of lands for a year should be put into writing, as no pecuniary rent was ever reserved, the consideration being usually five shillings, the receipt of which was acknowledged, though in fact it was never paid. And the bargain and sale, or lease for a year, was usually made by deed, though this was not absolutely necessary. It was generally dated the day before the date of the release, though executed

Bargain and
sale for a year
must be in
writing.

(*x*) 2 Prest. Conv. 219.
(*y*) Sugd. note to Gilb. Uses, 328; 2 Prest. Conv. 231; 2 Fonb. Eq. 12.

(*z*) Sugd. note to Gilb. Uses, 229.

(*a*) Stat. 29 Car. II. c. 3; *ante*, p. 148.

The estate must have been marked out.

on the same day as the release, immediately before the execution of the latter (b). On a conveyance by release from a freeholder in fee to his lessee for years in possession of the land, whether by entry or under the Statute of Uses, it was as necessary as it was in a feoffment, that the estate to be taken by the latter should be duly marked out; so that he would take no fee, even though the lessor released *all his estate* to him, unless the estate were released to him and his heirs (c).

Act abolishing the lease for a year.

This cumbrous contrivance of two deeds to every purchase continued in constant use down to the year 1841, when the Act was passed to which we have before referred (d). This Act provided that every deed of release of a freehold estate, which should be expressed to be made in pursuance of the Act, should be as effectual as if the releasing party had also executed, in due form, a lease for a year, for giving effect to such release, although no such lease for a year should be executed.

Act to amend the law of real property.

In the year 1845, it was provided by the Act to amend the law of real property (e) that after the 1st of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to *lie in grant* as well as in livery. We have seen that, at common law, corporeal hereditaments were said to lie in livery, as being transferable by delivery of possession; while incorporeal hereditaments were said to lie in grant, because a deed

(b) See Appendix (A) for the form of deeds of lease and release.

(c) Litt. s. 465; see *ante*, p. 141.

(d) Stat. 4 & 5 Vict. c. 21, repealed as obsolete by stat. 37 & 38 Vict. c. 96; *ante*, p. 186.

(e) Stat. 8 & 9 Vict. c. 106, s. 2. This Act repealed stat. 7 & 8 Vict. c. 76, ss. 2, 18, providing that after the year 1844 freehold land might be conveyed by deed without livery of seisin or a prior lease.

of grant was required to convey them, if desired to be transferred apart from the possession of anything corporeal (*f*). Since this enactment, therefore, a simple deed of grant has been sufficient for the transfer of all freehold estates in possession, or corporeal hereditaments (*g*). And the method so introduced of conveying freeholds by deed of grant has ever since superseded all others in practice.

The freehold possession or legal seisin being thus capable of being transferred by a deed of grant, there is the same necessity now as there was when a feoffment or release was employed, that the estate which the purchaser is to take should be marked out (*h*). In deeds executed after the year 1881, however, it is sufficient, in the limitation of an estate in fee simple, to use the words *in fee simple*, without the word *heirs*; and in the limitation of an estate in tail, to use the words *in tail*, without the words *heirs of the body*; and in the limitation of an estate in tail male or in tail female, to use the words *in tail male* or *in tail female*, as the case requires, without the words *heirs male of the body* or *heirs female of the body* (*i*). These expressions were authorized by the Conveyancing Act of 1881. But this Act did not abolish the necessity for using proper words of limitation. It is considered, therefore, that at the present day the limitation by deed of estates in fee or in tail must be made, either by making use of the old words of inheritance, or procreation (*k*), as *heirs*, *heirs of the body*, &c., or else by employing the exact expressions mentioned in the Act. Thus if a man has purchased an estate in fee simple, the conveyance must be expressed to be made to him *and his heirs*, or to him

(*f*) *Ante*, pp. 80, 81.

(*g*) *Ante*, p. 29.

(*h*) *Shep. Touch.* 327; *ante*, p. 140.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 51.

(*k*) *Ante*, p. 141.

in fee simple; for the construction of all conveyances, wills only excepted, is in this respect the same; and a conveyance to the purchaser simply, without these words, would merely convey to him an estate for his life, as in the case of a feoffment (*l*). In the case of a grant also, as well as in a feoffment, it is the better opinion that, in order to give permanent validity to the conveyance, it is necessary either that a consideration should be expressed in the conveyance, or that it should be made *to the use of* the purchaser as well as *unto* him (*m*): for a lease and release was formerly, and a deed of grant is now, as much an established conveyance as a feoffment; and the rule was, before the Statute of Uses, that any conveyance, and not a feoffment particularly, made to another without any consideration, or any declaration of uses, should be deemed to be made *to the use of* the party conveying. In order, therefore, to avoid any such construction, and so to prevent the Statute of Uses from immediately undoing all that has been done, it is usual to express, in every conveyance, that the purchaser shall hold, not only unto, but unto *and to the use of* himself and his heirs.

Conveyance made unto and to the use of the purchaser.

A conveyance may be made to uses.

A conveyance might also have been made by lease and release, as well as by a feoffment, to one person and his heirs *to the use of* some other person and his heirs; and, in this case, as in a similar feoffment, the latter person took at once the whole fee simple, the former serving only as an instrument to enable the Statute of Uses to execute the estate to him (*n*). This extraordinary result of the Statute of Uses is continually relied on in modern conveyancing; and it may now be accomplished by a deed of grant in the same manner as it might have been before effected by a lease and release.

(*l*) Shep. Touch. 327.

(*m*) 2 Sand. Uses, 64—69, (77—84, 5th ed.); Sugd. note to Gilb.

Uses, 223; see *ante*, pp. 124, 162, 166.

(*n*) See *ante*, p. 166.

It has been found particularly advantageous as a means for avoiding a rule of law, that a man cannot make any conveyance to himself; thus if it were wished to make a conveyance of lands from A., a person solely seised, to A. and B. jointly, this operation could not, before the Statute of Uses, have been effected by less than two conveyances; for a conveyance from A. directly to A. and B. would have passed the whole estate solely to B. (o). It would, therefore, have been requisite for A. to make a conveyance to a third person, and for such person then to re-convey to A. and B. jointly. And this was the method actually adopted, under similar circumstances, with respect to leasehold estates and personal property, which are not effected by the Statute of Uses, until an Act was passed by which any person may now assign leasehold or personal property to himself jointly with another (p); but this Act does not extend to freeholds. If the estate were freehold, previously to the year 1882, A. must have conveyed to B. and his heirs, to the use of A. and B. and their heirs; and a joint estate in fee simple would have immediately vested in them both. In conveyances made after 1881, the like result may be obtained without the aid of the Statute of Uses. For by the Conveyancing Act of 1881 (q), freehold land may now be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person. But this enactment does not appear to enable a man to make any conveyance to himself otherwise than jointly with another person. Suppose, then, a person should wish to convey a freehold estate to another, reserving to himself a life

(o) Perkins, s. 208. So a man cannot covenant to pay money to himself and another on a joint account; *Faulkner v. Lowe*, 2 Ex. Rep. 595.

(p) Stat. 22 & 23 Vict. c. 35,

s. 21; see Williams's Conveyancing Statutes, 224.

(q) Stat. 44 & 45 Vict. c. 41, s. 50; Williams's Conveyancing Statutes, 223.

and may convey to another to his own use.

interest,—without the aid of the Statute of Uses he would be unable to accomplish this result by a single deed (*r*). But, by means of the statute, he may make a conveyance of the property to the other and his heirs, *to the use* of himself (the conveying party) for his life, and from and immediately after his decease, *to the use* of the other and his heirs and assigns, or in fee simple (*s*). By this means the conveying party will at once become seised of an estate only for his life, and after his decease an estate in fee simple will remain for the other.

Form of a grant.

The consideration of the form of a deed of grant is reserved for a subsequent chapter (*t*). But it may be a help to the student to turn to that chapter now, and peruse the precedents of purchase deeds there given. He may not see the reason for every expression used in these deeds; but he will understand the gist of them; and it will quicken the knowledge he has already acquired to see how a grant of land is made in practice.

Conveyance of lands in Middlesex and Yorkshire.

In order to make a complete and unavoidable conveyance of lands situate in Middlesex or Yorkshire (including the town and county of Kingston-upon-Hull), a memorial of the deed of conveyance must be duly registered in the county register. The registration of deeds affecting lands in these counties was rendered necessary by statutes of the reigns of Anne and George II. (*u*). These Acts provided that all deeds

(*r*) Perk. ss. 704, 705; *Youls v. Jones*, 18 Mee. & Wels. 534.

(*s*) See *ante*, pp. 142, 193, 194.

(*t*) *Post*, Part VI.

(*u*) Stat. 7 Anne, c. 20 for Middlesex; the Middlesex register was transferred to the Land Registry Office by stat. 54 & 55 Vict. c. 64; see Rules thereunder, W. N., 13th Feb., 1892. Stats. 2 & 3 Anne c. 4; 6 Anne, c. 20 (5 Anne c. 18, in Ruffhead), for

the West Riding of Yorkshire; 6 Anne c. 62 (6 Anne c. 36, in Ruffhead), for the East Riding and Kingston-upon-Hull; and 8 Geo. II. c. 6, for the North Riding. All the Yorkshire Acts were repealed and replaced by stat. 47 & 48 Vict. c. 54. The deeds must be first duly stamped; stat. 54 & 55 Vict. c. 39, s. 17, replacing 33 & 34 Vict. c. 97, s. 22.

should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such deeds were duly registered before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee should claim. The Courts of Equity, however, held that a purchaser or mortgagee of land in a register county, who had had clear previous notice of a prior unregistered assurance affecting the same land, and yet registered his own deed before the other, should not be permitted to gain any priority over the persons claiming under the previous assurance with regard to the *equitable* estate in the land; but should hold the *legal* estate which he acquired by priority of registration, as a trustee for such other persons (*x*). And this doctrine of equity still prevails with respect to land in Middlesex. But with respect to land in Yorkshire and Kingston-upon-Hull, it is now enacted in the Yorkshire Registries Act, 1884 (*y*), which has repealed and replaced the former Registry Acts for those places, that all assurances affecting lands in those places *may be* registered under the Act; and that all assurances entitled to be registered under this Act shall have priority according to the date of registration; and that all priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests, shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud. This enactment appears to displace the former doctrine of equity with regard to lands in Yorkshire, thus rendering registration

Notice of
unregistered
assurance.

(*x*) See Williams's Conveyancing Statutes, 23; *Lo Nove v. Lo Nove*, 2 White & Tudor, Leading Cases in Equity, 32, 45-48, 5th ed.; *Rolland v. Hart*, L. R., 6

Ch. 678; *ante*, p. 189.

(*y*) Stat. 47 & 48 Vict. c. 54, ss. 4, 14, as amended by stat. 48 & 49 Vict. c. 26, s. 4.

Bedford
Level.

even more essential than before. Conveyances of lands forming part of the great level of the fens, called Bedford Level, are also required to be registered in the Bedford Level Office (*z*); but the construction which has been put on the statute, by which such registration is required, prevents any priority of interest from being gained by priority of registration (*a*).

Lease and
release an
innocent con-
veyance.

So a grant.

Word *grant*.

A lease and release was said to be an innocent conveyance; for when, by means of the lease and the Statute of Uses, the purchaser had once been put into possession, he obtained the fee simple by the release; and a release never operates by wrong, as a feoffment occasionally did (*b*), but simply passes that which may lawfully and rightly be conveyed (*c*). The same rule is applicable to a deed of grant (*d*). Thus, if a tenant merely for his own life should, by a lease and release, or by a grant, purport to convey to another an estate in fee simple, his own life interest only would pass, and no injury would be done to the reversioner. The word *grant* is the proper and technical term to be employed in a deed of grant (*e*), but its employment is not absolutely necessary; for it has been held that other words indicating an intention to grant will answer the purpose (*f*). And by the Conveyancing Act of 1881 (*g*), it is declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

Conveyance of
freeholds still
a formal
matter.

It will be seen then that the conveyance of a freehold estate at law is still a formal matter: though the chief

(*a*) Stat. 15 Car. II. c. 17, s. 8. 124; *Haggerston v. Hanbury*, 5
(*a*) *Willis v. Brown*, 10 Sim. Barn. & Cress. 101.
127. (*g*) Stat. 44 & 45 Vict. c. 41,
(*b*) *Ante*, p. 142. s. 49, which applies to convey-
(*c*) Litt. s. 600. ances made before or after the
(*d*) Litt. ss. 616, 617. commencement of the Act. See
(*e*) Shep. Touch. 229. Williams's Conveyancing Sta-
(*f*) *Shove v. Fincke*, 5 T. Rep. tutes, 222.

requisite in this respect is now a deed, and not delivery of possession, as was the case at common law (*h*). Nor will an informal expression of intention ever suffice to transfer a legal estate of freehold (*i*). Since it was enacted in 1845 that corporeal hereditaments should lie in grant as well as in livery, it has been the regular practice to convey freeholds by deed of grant (*k*). It should be noted, however, that other methods of conveyance may still be employed, though in practice they seldom are. Thus a feoffment with livery of seisin may still be made. But as a feoffment must now be evidenced by deed, unless made by an infant under a custom (*l*), it would only give extra trouble to use it. A feoffment by an infant under the custom of gavelkind (*m*) is perhaps the only case in which this mode of assurance is now used in practice. In this case the freehold may be conveyed without deed; but the feoffment must be put into writing and signed by the infant to satisfy the Statute of Frauds (*n*); and formal livery of seisin must be made by the infant in person (*o*). So an estate in fee simple may be conveyed by deed of bargain and sale duly enrolled pursuant to the statute of Henry VIII. already mentioned (*p*). But this assurance is now hardly ever employed (*q*): though it has the advantage that an office copy of the inrolment of a bargain and sale is as

Bargain and
sale.

(*h*) *Ante*, pp. 188, 189.

(*i*) *Ante*, p. 188. As to the effect which such expressions may have in equity, see *ante*, pp. 178, 177.

(*k*) Davidson, *Prec. Conv.* vol. ii., part i., p. 176, 4th ed.

(*l*) *Ante*, p. 149.

(*m*) *Ante*, p. 55.

(*n*) *Ante*, p. 149.

(*o*) Davidson, *Prec. Conv.* vol. ii., part i., pp. 177, 244, 4th ed.

(*p*) *Ante*, p. 189. In some cities and boroughs the inrolment of bargains and sales is made by the mayors or other officers; stat. 27 Hen. VIII. c. 16, s. 2. Of lands in the counties of Lancaster

or Durham it may be made in the Lancaster or Durham Court of Chancery; stat. 5 Eliz. c. 26, which also permitted inrolment in the palatine courts of Chester, until they were abolished by 11 Geo. IV. and 1 Will. IV. c. 70. Under the old Yorkshire Registry Acts, inrolment might be made in the county registers; 5 & 6 Anne c. 18, s. 1; 6 Anne c. 85, ss. 16, 17, 34; 8 Geo. II. c. 6, s. 21; but no similar provisions are contained in the Yorkshire Registries Act, 1884.

(*q*) Davidson, *Prec. Conv.* vol. ii., part i., p. 179, 4th ed.

Bargain and sale cannot be made to one person to the use of another.

Covenant to stand seised.

Release.

good evidence as the original deed (*r*). When a bargain and sale is employed, the whole legal estate in fee simple passes, as we have seen (*s*), by means of the Statute of Uses,—the bargainor becoming seised to the use of the bargainee and his heirs. A bargain and sale, therefore, cannot, like a lease and release, or a grant, be made to one person to the use of another; for, the whole force of the Statute of Uses is already exhausted in transferring the legal estate in fee simple to the bargainee; so that the use declared would be a use upon a use, void at law, though valid in equity (*t*). Similar to a bargain and sale is another method of conveyance occasionally, though very rarely, employed, namely, a *covenant to stand seised* of land to the use of another, in consideration of blood or marriage. This is also an assurance by means of the Statute of Uses; for when such a covenant is made, the legal estate in the land passes at once to the covenantee under the Statute. No enrolment of the deed of covenant is necessary; for the statute requiring the enrolment of bargains and sales extends only to bargains for valuable consideration, which the consideration of relationship by blood or marriage is not (*u*). This is perhaps the only instance in which such a consideration is of any effect in law (*x*). And it may be noted that a deed, in which such a consideration is expressed, may take effect as a covenant to stand seised, though it be in the form of a grant or other assurance (*y*). Again, a release is still an appropriate method of conveying an estate from a freeholder to any one, who with his privy is in actual possession of the land, either by entry or under the Statute of

(*r*) Stat. 10 Anne, c. 28 (c. 18 in Ruffhead), s. 8.

(*s*) *Ante*, pp. 188, 139.

(*t*) *Ante*, p. 167.

(*u*) An intended marriage is a valuable consideration, but not the mere fact of relationship by marriage.

(*x*) Principles of the Law of Personal Property, 108, n., 18th ed.

(*y*) See *Doe d. Daniell v. Woodroffe*, 10 M. & W. 603; *Doe d. Starling v. Prince*, 15 Jur. 632; Prest. Abst. i. 70—72, iii. 121, 122, 187; Williams on Seisin, 145.

Uses (2). And a confirmation by the rightful owner of land to any one, who is actually possessed of it, has the same effect as of old (a). But, as has been explained, these are properly cases of the conveyance of incorporeal hereditaments, which always lay in grant (b). So that a deed expressed in terms of grant might always take effect as a release or confirmation (c). Of course, now that corporeal hereditaments lie in grant as well as incorporeal, it would be purely superfluous to gain possession under a lease, or to make an entry, for the mere purpose of receiving a release or confirmation from the freeholder in fee. It may be mentioned that a deed is now required to make an exchange or a surrender of any freehold estate valid at law (d), except in the case of a surrender by operation of law (e).

Confirmation.

Exchange;
Surrender.

In addition to all these methods of conveyance, by which the right of alienation *incident to an estate* in land may be exercised (f), an estate of freehold may be conveyed by the exercise of a power of appointment or of a statutory power. Mention has already been made of conveyance under powers (g), and more will be said on this subject in a future chapter (h). The student, indeed, can never be too careful to avoid supposing that, when he has read a chapter of the present, or any other elementary work, he is therefore acquainted with all that is to be known on the subject. To place him in a position to comprehend more is all that can be attempted in a first book.

Conveyance
under powers.(a) *Ante*, pp. 151, 187.(a) *Ante*, p. 151.(b) *Ante*, pp. 151, 187.(c) *Litt. s. 581*; *Co. Litt. 301 b.*(d) *Stat. 8 & 9 Vict. c. 106, s. 8*; *ante*, p. 151.(e) See *Lyon v. Reed*, 13 M. & W. 285, 306.(f) *Ante*, pp. 62—70, 140, 141.(g) *Ante*, p. 112.(h) *Post*, Pt. II., ch. iii.

CHAPTER IX.

OF THE DESCENT OF AN ESTATE IN FEE SIMPLE.

HAVING examined the means of conveying a freehold estate between living persons, we will now proceed to consider the subject of succession after death. This can, of course, only take place in the case of a freehold estate in fee or in tail. Succession to a freehold in fee may be upon intestacy or under a will: but the succession to an estate tail cannot be affected by the tenant's will, as we have seen (*a*). At the present day, it is perhaps exceptional for a man to become entitled to a freehold in fee, as *heir*, upon the death of a former tenant intestate (*b*). But as this is a more ancient method of acquiring title than to take lands by devise under the tenant's last will, we will first investigate the law of succession upon intestacy, and afterwards examine that of conveyance by will. We shall, therefore, now proceed to consider the rules of the descent of a fee, as altered by the Act for the amendment of the law of inheritance (*c*). This Act does not extend to any descent on the death of any person, who may have died before the year 1834 (*d*). For the rules of descent prior to that date, the reader is referred to the Commentaries of Blackstone (*e*), to Watkins's Essay on the Law of Descents, and to the author's Lectures on Seisin, pp. 51-69.

Rules of
descent.

(*a*) *Ante*, p. 101.

(*b*) See *ante*, pp. 80, 81.

(*c*) Stat. 8 & 4 Will. IV. c. 106,
amended by 22 & 23 Vict. c. 35,

ss. 19, 20.

(*d*) Sect. 11.

(*e*) 2 Black. Comm. c. 14.

1. The first rule of descent now is, that inheritances Rule 1. shall lineally descend, in the first place, to the issue of the last purchaser *in infinitum*. As we have seen (*f*), Purchase. the word purchase has in law a meaning more extended than its ordinary sense: it is possession to which a man cometh not by title of descent (*g*): a devisee under a will is accordingly a purchaser in law. And, by the Act, the purchaser from whom descent is to be traced is defined to be the last person who had a right to the land, and who cannot be proved to have acquired the land by descent, or by certain means (*h*) which render the land part of, or descendible in the same manner as, other land acquired by descent. This rule is an alteration of the old law, which was, that descent should be traced from the person who last had the feudal possession or seisin (*i*); the maxim being *seisina facit stipitem* (*k*). This maxim, a relict of the troublesome times when right without possession was worth but little, sometimes gave occasion to difficulties, owing to the uncertainty of the question, whether possession had or had not been taken by any person entitled as heir; thus, where a man was entering into a house by the window, and when half out and half in, was pulled out again by the heels, it was made a question, whether or not this entry was sufficient, and it was adjudged that it was (*l*). These difficulties cannot arise under the present law; for now the heir to be sought for is not the heir of the person *last possessed*, but the heir of the *last person entitled who did not inherit*, whether he did or did not obtain the possession, or the receipt of the rents and profits of the land. The rule, as altered, is not indeed Objection to the alteration. altogether free from objection; for it will be observed that, not content with making a title to the land equi-

(*f*) *Ante*, p. 65.

(*g*) Litt. s. 12.

(*h*) Escheat, Partition and Inclosure, s. 1.

(*i*) *Ante*, p. 85.

(*k*) 2 Black. Comm. 209;

Watk. Descent, c. 1, s. 2.

(*l*) Watk. Descent, 45 (4th ed. 58).

valent to possession, the Act of 1833 added a new term to the definition, by directing descent to be traced from the last person entitled *who did not inherit*. So that if a person who has become entitled as heir to another should die intestate, the heir to be sought for is not the heir of such last owner, but the heir of the person from whom such last owner inherited. This provision, though made by an Act consequent on the report of the Real Property Commissioners, was not proposed by them. The Commissioners merely proposed that lands should pass to the heir of the *person last entitled (m)*, instead, as before, of the *person last possessed*; thus facilitating the discovery of the heir, by rendering a mere title to the lands sufficient to make the person entitled the stock of descent, without his obtaining the feudal possession, as before required. Under the old law, descent was confined within the limits of the family of the *purchaser*; but now no person who can be shown to have inherited can be the stock of descent, except in the case of the total failure of the heirs of the purchaser (*n*); in every other case, descent must be traced from the last *purchaser*. The author is bound to state that the decision of the Courts of Exchequer and the Exchequer Chamber, in the case of *Muggleton v. Barnette (o)*, is opposed to this view of the construction of the statute. The reasons which induced the author to think that decision erroneous will be found in Appendix B.

Rule 2. 2. The second rule is, that the male issue shall be admitted before the female (*p*).

Rule 3. 3. The third rule is, that where two or more of the male issue are in equal degree of consanguinity to the

(m) Thirteenth proposal as to Descents.

(n) Stat. 22 & 23 Vict. c. 35, ss. 19, 20.

(o) 1 H. & N. 282; 2 H. & N. 653.

(p) 2 Black. Comm. 212.

purchaser the eldest only shall inherit ; but the females shall inherit all together (*q*). The last two rules are the same now as before the recent Act ; accordingly, if a man has two sons, William and John, and two daughters, Susannah and Catherine (*r*), William, the eldest son, is the heir at law, in exclusion of his younger brother John, according to the third rule, and of his sisters, Susannah and Catherine, according to rule 2, although such sisters should be his seniors in years. If, however, William should die without issue, then John will succeed, by the second rule, in exclusion of his sisters ; but if John also should die without issue, the two sisters will succeed in equal shares by the third rule as being together heir to their father.

Primogeniture, or the right of the eldest among the males to inherit, was a matter of far greater consequence in ancient times, before alienation by will was permitted, than it is at present. Its feudal origin is undisputed ; but in this country it appears to have taken deeper root than elsewhere ; for a total exclusion of the younger sons appears to be peculiar to England : in other countries, some portion of the inheritance, or some charge upon it, is, in many cases at least, secured by law to the younger sons (*s*). From this ancient right has arisen the modern English custom of settling the family estates on the eldest son ; but the right and the custom are quite distinct : the right may be prevented by the owner making his will ; and a conformity to the custom is entirely at his option.

When two or more persons together form an heir, they are called in law, *coparceners*, or, more shortly, *parceners* (*t*). The term is derived, according to

(*q*) 2 Black. Comm. 214.

(*r*) See the Table of Descents annexed.

(*s*) Co. Litt. 191 a, n. (1), vi. 4.

(*t*) Bac. Abr. tit. Coparceners.

Partition.

Littleton (*u*), from the circumstance that the law will constrain them to make partition; that is, any one may oblige all the others so to do. Whatever may be thought of this derivation, it will serve to remind the reader that coparceners are the only kind of joint owners to whom the ancient common law granted the power of severing their estates without mutual consent: as the estate in coparcenary was cast on them by the act of the law, and not by their own agreement, it was thought right that the perverseness of one should not prevent the others from obtaining a more beneficial method of enjoying the property. This compulsory partition was formerly effected by a writ of partition (*x*), a proceeding now abolished (*y*). The modern method is by an action for partition in the Chancery Division of the High Court; when partition is made by the judge in Chambers, or more rarely by a commission issued for the purpose by the Court (*z*). Partition, however, is most frequently made by voluntary agreement between the parties, and for this purpose a deed has, by a modern Act of Parliament, been rendered essential in every case (*a*). The Board of Agriculture has also power to effect partitions, by virtue of modern enactments which will be found mentioned at the end of the chapter on Joint Tenants and Tenants in Common. When partition has been effected, the lands allotted are said to be held in *severalty*; and each owner is said to have the *entirety* of her own parcel. After partition, the several parcels of land descend in the same manner as the undivided shares, for which they have been substituted (*b*); the coparceners, there-

Severalty.

Entirety.

(*u*) Sect. 241; 2 Black. Comm. 189.

(*x*) Litt. ss. 247, 248.

(*y*) Stat. 8 & 4 Will. IV. c. 27, s. 86.

(*z*) *Ante*, p. 186; Co. Litt. 169 a, n. (2); 1 Fonb. Eq. 18; *Canning v. Canning*, 2 Drewry,

424; Seton on Decrees, 1012—1080, 4th ed.

(*a*) Stat. 8 & 9 Vict. c. 106, s. 8, repealing stat. 7 & 8 Vict. c. 76, s. 8, to the same effect.

(*b*) 2 Prest. Abst. 72; *Doe d. Crosthwaite v. Dixon*, 5 Adol. & Ellis, 834.

fore, do not by partition become *purchasers*, but still continue to be entitled by descent. The term *coparceners* is not applied to any other joint owners, but only to those who have become entitled as coheirs (c).

4. The fourth rule is, that all the lineal descendants *Rule 4.* *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living (d). Thus, in the case above mentioned, on the death of William the eldest son, leaving a son, that son would succeed to the whole by right of representation, in exclusion of his uncle John, and of his two aunts Susannah and Catherine; or had William left a son and daughter, such daughter would, after the decease of her brother without issue, be, in like manner, the heir of her grandfather, in exclusion of her uncle and aunts.

The preceding rules of descent apply as well to the descent of an estate tail, if not duly barred, as to that of an estate in fee simple. The descent of an estate tail is always traced from the purchaser, or donee in tail, that is, from the person to whom the estate tail was at first given. This was the case before the Act as well as now (e); for, the person who claims an entailed estate as heir claims only according to the express terms of the gift, or, as it is said, *per formam doni*. The gift is made to the donee, or purchaser, and the heirs of his body; all persons, therefore, who can become entitled to the estate by descent, must answer the description of heirs of the purchaser's body; in other words, must be *his* lineal heirs. The second and third rules also equally apply to estates tail, unless the restriction of the descent to heirs male or female should render unnecessary the second, and either clause of the third

(c) Litt. 254.

(d) 2 Black. Comm. 216.

(e) *Doe d. Gregory v. Whitchelo*,
8 T. Rep. 211.

rule. The fourth rule completes the canon, so far as estates tail are concerned ; for, when the issue of the donee are exhausted, such an estate must necessarily determine. But the descent of an estate in fee simple may extend to many other persons, and accordingly requires for its guidance additional rules, with which we now proceed.

Widow's
interest on
death of
tenant in fee
without issue.

The descent of a fee simple upon the tenant's death without leaving issue is now subject to the interest which his widow may take therein under the Intestates Estates Act, 1890 (*f*). By this Act (*g*), the real and personal estates of every man, who shall die intestate after the 1st of September, 1890, leaving a widow, but no issue, shall, if not exceeding five hundred pounds in net value (*h*), belong to his widow absolutely ; and shall, if exceeding that sum in net value, be subject to a charge in her favour of five hundred pounds, with interest at four per cent. from the date of death till payment, to be borne by the real and personal estates in proportion to their value. The provision so made is to be in addition to the widow's other interest in her intestate husband's real and personal estate (*i*). It appears that the whole estate of a tenant in fee simple will devolve on his widow, in the case contemplated by this Act, whether he became entitled by purchase or inheritance. But in other cases his estate will descend according to the following rules, subject, of course, to the charge given by the Act, where it arises.

Rule 5.

5. The fifth rule is, that on failure of lineal descendants, or issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor. This rule is

(*f*) Stat. 53 & 54 Vict. c. 39.

(*g*) Sects. 1—3.

(*h*) *I. e.*, after deducting the value of any charges on the real estate, and of all debts, funeral

and testamentary expenses, and other liabilities, payable out of the personal estate; see ss. 5, 6.

(*i*) Sect. 4. See *post*, ch. xiii.

materially different from the rule which prevailed before the passing of the Act. The former rule was, that, on The old rule. failure of lineal descendants or issue of the person last seised (or feudally possessed), the inheritance should descend to his *collateral* relations, being of the blood of the first purchaser, subject to the three preceding rules (*k*). The old law never allowed lineal relations in the ascending line (that is, parents or ancestors) to succeed as heirs. But, by the new Act, descent is to be traced through the ancestor, who is to be heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor. The exclusion of parents and Exclusion of lineal ancestors. other lineal ancestors from inheriting under the old law was a hardship of which it is not easy to see the propriety; nor is the explanation usually given of the origin perhaps quite satisfactory. Bracton, who is followed by Lord Coke, compares the descent of an inheritance to that of a falling body, which never goes upwards in its course (*l*). The modern explanation derives the origin of collateral heirships, in exclusion of lineal ancestors, from gifts of estates (at the time when inheritances were descendible only to issue or lineal heirs) made, by the terms of the gift, to be descendible to the heirs of the donee, in the same manner as an ancient inheritance would have descended. This was called a gift of a *feudum novum*, or new inheritance, to hold *ut feudum antiquum*. Feudum novum ut antiquum. Now, an ancient inheritance, — one derived in a course of descent from some remote lineal ancestor, — would of course be descendible to all the issue or *lineal* heirs of such ancestor, including, after the lapse of many years, numerous families, all *collaterally* related to one another; an estate newly granted, to be descendible *ut feudum antiquum*, would

(k) 2 Black. Comm. 220.

11 a.

(l) Bract. fo. 62 b; Co. Litt.

W.R.P.

therefore be capable of descending to the collateral relations of the grantee, in the same manner as a really ancient inheritance, descended to him, would have done. But an ancient inheritance could never go to the father of any owner, because it must have come from his father to him, and the father must have died before the son could inherit: in grants of inheritances to be descendible as ancient ones, it followed, therefore, that the father or any lineal ancestor could never inherit (*m*). So far, therefore, the explanation holds; but it is not consistent with every circumstance; for an elder brother has always been allowed to succeed as heir to his younger brother, contrary to this theory of an ancient lineal inheritance, which would have previously passed by every elder brother, as well as the father. The explanation of the origin of a rule, though ever so clear, is, however, a different thing from a valid reason for its continuance; and, at length, the propriety of placing the property of a family under the care of its head, is now perceived and acted on; and the father is heir to each of his children, who may die intestate, and without issue, as is more clearly pointed out by the next rule.

Rule 6.

6. The sixth rule is, that the father and all the male paternal ancestors of the purchaser, and their descendants, shall be admitted before any of the female paternal ancestors or their heirs; all the female paternal ancestors and their heirs before the mother or any of the maternal ancestors, or her or their descendants; and the mother and all the male maternal ancestors, and her and their descendants, before any of the female maternal ancestors, or their heirs (*n*). This rule is a development of the ancient canon, which requires that, in collateral inheritances, the male stock should always

Preference of
males to
females.

(*m*) 2 Black. Comm. 212, 221, 222; Wright's Tenures, 180. See also Co. Litt. 11 a, n. (1).

(*n*) Stat. 3 & 4 Will. IV. c. 106, s. 7, combined with the definition of "descendants," s. 1.

be preferred to the female; and it is analogous to the second rule above given, which directs that in lineal inheritances the male issue shall be admitted before the female. This strict and careful preference of the male to the female line was in full accordance with the spirit of the feudal system, which, being essentially military in its nature, imposed obligations by no means easy for a female to fulfil; and those who were unable to perform the services could not expect to enjoy the benefits (o). The feudal origin of our laws of descent will not, however, afford a complete explanation of this preference; for such lands as continued descendible after the Saxon custom of equal division, and not according to the Norman and feudal law of primogeniture, were equally subject to the preference of males to females, and descended in the first place exclusively to the sons, who divided the inheritance between them, leaving nothing at all to their sisters. The true reason of the preference appears to lie in the degraded position in society, which, in ancient times, was held by females; a position arising from their deficiency in that kind of might, which then too frequently made the right. The rights given by the common law to a husband over his wife's property (rights in modern times generally controlled by proper settlements previous to marriage, and now abolished) show the state of dependence to which, in ancient times, women must have been reduced (p). The preference of males to females was left untouched by the Act for the amendment of the law of descents; and the father and all his most distant relatives have priority over the mother of the purchaser; she cannot succeed as his heir until all the paternal ancestors of the purchaser, both male and female, and their respective families, have been exhausted. The father, as the

Preference of
males to
females still
continued.

(o) 2 Black. Comm. 214.

(p) See *post*, the chapter on Husband and Wife; Williams on Personal Property, 480 *et seq.*, 18th ed.

nearest male lineal ancestor, of course stands first, supposing the issue of the purchaser to have failed. If the father should be dead, his eldest son, being the brother of the purchaser, will succeed as heir in the place of his father, according to the fourth rule; unless he be of the half blood to the purchaser, which case is provided for by the next rule, which is:—

Rule 7.

7. That a kinsman of the half blood shall be capable of being heir; and that such kinsman shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman, when the common ancestor is a male (*q*), and next after the common ancestor, when such ancestor is a female. This introduction of the half blood is also a new regulation; and, like the introduction of the father and other lineal ancestors, it is certainly an improvement on the old law, which had no other reason in its favour than the feudal maxims, or rather fictions, on which it was founded (*r*). By the old law, a relative of the purchaser of the half blood, that is, a relative connected by one only, and not by both of the parents, or other ancestors, could not possibly be heir; a half brother, for instance, could never enjoy that right which a cousin of the whole blood, though ever so distant, might claim in his proper turn. The exclusion of the half blood was accounted for in a manner similar to that by which the exclusion of all lineal ancestors was explained; but a return to practical justice may well compensate a breach in a beautiful theory. Relatives of the half blood now take their proper and natural place in the order of descent. The position of the half blood next after the common ancestor, when such ancestor is a female, is rather a result of the sixth rule, than an additional independent regulation, as will appear hereafter.

By the old law the half blood could not inherit.

(*q*) Stat. 8 & 4 Will. IV., c. 106, s. 9. (*r*) 2 Black. Comm. 22

8. The eighth rule is, that in the admission of female Rule 8. paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor, and her heirs; and, in the admission of female maternal ancestors, the mother of the more remote male maternal ancestor, and her heirs, shall be preferred to the mother of a less remote male maternal ancestor, and her heirs (*s*). The eighth rule is a settlement of a point in distant heirships, which very seldom occurs, but which has been the subject of a vast deal of learned controversy. The opinion of Blackstone (*t*) and Watkins (*u*) is now declared to be the law.

9. A further rule of descent was introduced by a Rule 9. statute of 1859 (*x*), which enacts that, where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof. This enactment provides for such a case as the following. A purchaser of lands may die intestate, leaving an only son and no other relations. On the death of the son intestate there will be a total failure of the heirs of the purchaser; and previously to this enactment the land would have escheated to the lord of the fee (*y*). But now, although there be no relations of the son on his father's side, yet he may have relations on the part of his mother, or his mother may herself be living: and these persons, who were before totally excluded.

(*s*) Stat. 3 & 4 Will. IV. c. 106, s. 8. See *Graves v. Greenwood*, 2 Ex. D. 289. (146 *et seq.*, 4th ed.).
 (*t*) 2 Black. Comm. 288. (*x*) Stat. 22 & 23 Vict. c. 35 ss. 19, 20.
 (*u*) Watkins on Descents, 130 (*y*) *Ante*, pp. 46, 52.

are now admitted in the order mentioned in the sixth rule.

Explanation
of the table.

Descent to
the sons and
their issue.

The rules of descent above given will be better apprehended by a reference to the accompanying table, taken, with a little modification, from Mr. Watkins's Essay on the Law of Descents. In this table, Benjamin Brown is the purchaser, from whom the descent is to be traced. On his death intestate, the lands will accordingly descend first to his eldest son, by Ann Lee, William Brown; and from him (2ndly) to *his* eldest son by Sarah Watts, Isaac Brown. Isaac dying without issue we must now seek the heir of the *purchaser*, and not the heir of Isaac. William, the eldest son of the purchaser, is dead; but William may have had other descendants, besides Isaac his eldest son; and, by the fourth rule, all the lineal descendants *in infinitum* of every person deceased shall represent their ancestor. We find accordingly that William had a daughter Lucy by his first wife, and also a second son, George, by Mary Wood, his second wife. But the son George, though younger than his half sister Lucy, yet being a male, shall be preferred according to the second rule; and he is therefore (3rdly) the next heir. Had Isaac been the purchaser, the case would have been different; for, his half brother George would then have been postponed, in favour of his sister Lucy of the whole blood, according to the seventh rule. But now Benjamin is the purchaser, and both Isaac and George are equally his grandchildren. George dying without issue, we must again seek the heir of his grandfather Benjamin, who now is undeniably (4thly) Lucy, she being the remaining descendant of his eldest son. Lucy dying likewise without issue, her father's issue become extinct; and we must still inquire for the heir of Benjamin Brown the purchaser, whom we now find to be (5thly) John Brown, his only son by his second wife. The land then

descends from John to (6thly) *his* eldest son Edmund, and from Edmund (7thly) to his only son James. James dying without issue, we must once more seek the heir of the purchaser, whom we find among the yet living issue of John. John leaving a daughter by his first wife, and a son and a daughter by his second wife, the lands descend (8thly) to Henry his son by Frances Wilson, as being of the male sex ; but he dying without issue, we again seek the heir of Benjamin, and find that John left two daughters, but by different wives ; these daughters, being in the same degree and both equally the children of their common father whom they represent, shall succeed (9thly) in equal shares. One of these daughters dying without issue in the lifetime of the other, the other shall then succeed to the whole as the only issue of her father. But the surviving sister dying also without issue, we still pursue our old inquiry and seek again for the heir of Benjamin Brown the purchaser.

The issue of the sons of the purchaser is now extinct ; and, as he left two daughters, Susannah and Catherine, by different wives, we shall find, by the second and third rules, that they next inherit (10thly) in equal shares as heirs to him. Catherine Brown, one of the daughters, now marries Charles Smith, and dies, in the lifetime of her sister Susannah, leaving one son John. The half share of Catherine must then descend to the next heir of her father Benjamin, the purchaser. The next heirs of Benjamin Brown, after the decease of Catherine, are evidently Susannah Brown and John Smith, the son of Catherine. And in the first edition of the present work it was stated that the half share of Catherine would, on her decease, descend to them. This opinion has been very generally entertained (2).

Descent to the daughters of the purchaser and their issue.

(2) 28 Law Mag. 279 ; 1 Hayes's wood's Conveyancing, by Sweet, Conv. 813 ; 1 Jarman & Bythe- 189.

On further research, however, the author inclined to the opinion that the share of Catherine would, on her decease, descend entirely to her son (11thly) by right of representation ; and that, as respects his mother's share, he and he only is the right heir of the purchaser. The reasoning which led the author to this conclusion will be found in the Appendix (a). This point is now established by judicial decision (b).

Descent to
the father of
the purchaser,
and his issue.

If Susannah Brown and John Smith should die without issue, the descendants of the purchaser will then have become extinct; and Joseph Brown, the father of the purchaser, will then (12thly), if living be his heir by the fifth and sixth rules. Bridget, the sister of the purchaser, then succeeds (13thly), as representing her father, in preference to her half brother Timothy, who is only of the half blood to the purchaser, and is accordingly postponed to his sister by the seventh rule. But next to Bridget is Timothy (14thly) by the same rule, Bridget being supposed to leave no issue.

Descent to the
male paternal
ancestors of
the purchaser
and their
issue.

On the decease of Timothy without issue, all the descendants of the father will have failed, and the inheritance will next pass to Philip Brown (15thly), the paternal grandfather of the purchaser. But the grandfather being dead, we must next exhaust his issue, who stand in his place, and we find that he had another son, Thomas (16thly), who accordingly is the next heir; and, on his decease without issue, Stephen Brown (17thly), though of the half blood to the purchaser, will inherit, by the seventh rule, next after Thomas, a kinsman in the same degree of the whole blood. Stephen Brown dying without issue, the descendants of the

(a) See Appendix (C.).

(b) *Cooper v. France*, 14 Jur. 214; 19 L. J. (N. S.) Ch. 318; *Levin v. Levin*, C. P., 21 Nov. 1874, stated in the Author's Lectures on the Seisin of the Freehold, Lecture VI., p. 81.

grandfather are exhausted ; and we must accordingly still keep, according to the sixth rule, in the male paternal line, and seek the paternal great grandfather of the purchaser, who is (18thly) Robert Brown ; and who is represented, on his decease, by (19thly) Daniel Brown, his son. After Daniel and his issue follow, by the same rule, Edward (20thly) and his issue (21stly) Abraham.

All the male paternal ancestors of the purchaser, and their descendants, are now supposed to have failed ; and by the sixth rule, the female paternal ancestors and their heirs are next admitted. By the eighth rule, in the admission of the female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor and her heirs. Barbara Finch (22ndly), and her heirs, have therefore priority both over Margaret Pain and her heirs, and Esther Pitt and her heirs ; Barbara Finch being the mother of a more remote male paternal ancestor than either Margaret Pain or Esther Pitt. Barbara Finch being dead, her heirs succeed her ; *she* therefore must now be regarded as the stock of descent, and her heirs will be the right heirs of Benjamin Brown the purchaser. In seeking for her heirs inquiry must first be made for her issue ; now her issue by Edward Brown has already been exhausted in seeking for his descendants ; but she might have had issue by another husband ; and such issue (23rdly) will accordingly next succeed. These issue are evidently of the half blood to the purchaser. But they are the right heirs of Barbara Finch ; and they are accordingly entitled to succeed next after her, without the aid they might derive from the position expressly assigned to them by the seventh rule. The common ancestor of the purchaser and of the issue is Barbara Finch, a female ; and, by the united operation

Descent to the female paternal ancestors and their heirs.

Half blood to the purchaser where the common ancestor is a female.

of the other rules, these issue of the half blood succeed next after the common ancestor. The latter part of the seventh rule is, therefore, explanatory only, and not absolutely necessary (c). In default of issue of Barbara Finch, the lands will descend to her father Isaac Finch (24thly), and then to his issue (25thly), as representing him. If neither Barbara Finch, nor any of her heirs, can be found, Margaret Pain (26thly), or her heirs, will be next entitled, Margaret Pain being the mother of a more remote male paternal ancestor than Esther Pitt; but next to Margaret Pain and her heirs will be Esther Pitt (27thly), or her heirs, thus closing the list of female paternal ancestors.

Descent to the mother of the purchaser and the maternal ancestors.

Next to the female paternal ancestors and their heirs comes the mother of the purchaser, Elizabeth Webb, (28thly) (supposing her to be alive), with respect to whom the same process is to be pursued as has before been gone over with respect to Joseph Brown, the purchaser's father. On her death, her issue by John Jones (29thly) will accordingly next succeed, as representing her, by the fourth rule, agreeably to the declaration as to the place of the half blood contained in the seventh rule. Such issue becoming extinct, the nearest male maternal ancestor is the purchaser's maternal grandfather, William Webb (30thly), whose issue (31stly) will be entitled to succeed him. Such issue failing, the whole line of male maternal ancestors and their descendants must be exhausted, by the sixth rule, before any of the female maternal ancestors, or their heirs, can find admission; and when the female maternal ancestors are resorted to, the mother of the more remote male maternal ancestor, and her heirs, is to be preferred, by the eighth rule, to the mother of the less remote male maternal ancestor, and her heirs. The course to be

(c) See Jarman & Bythewood's Conveyancing, by Sweet, vol. i. 146, note (a).

taken is, accordingly, precisely the same as in pursuing the descent through the paternal ancestors of the purchaser. In the present table, therefore, Harriet Tibbs (32ndly), the maternal grandmother of the purchaser, is the person next entitled, no claimants appearing whose title is preferable; and, should she be dead, her heirs will be entitled next after her. On the failure of the heirs of the purchaser, the person last entitled is, as we have seen (*d*), to be substituted in his place, and the same course of investigation is again to be pursued with respect to the person last entitled as has already been pointed out with respect to the last purchaser. And if ^{Escheat.} there should be no heirs of the person last entitled, as well as of the purchaser, the land will escheat to the lord of the fee, as has been previously explained (*e*).

It should be carefully borne in mind, that the above-mentioned rules of descent apply exclusively to estates in land, and to that kind of property which is denominated *real*, and have no application to money or other personal estate, which is distributed on intestacy in a manner which the reader will find explained in the author's treatise on the law of personal property (*f*). Rules of descent do not apply to personal estate.

An exception to the law of descent is made in case of the death, after the year 1881 (*g*), of a sole trustee or mortgagee of freeholds. For by the Conveyancing Act of 1881 (*h*), where a freehold estate or interest of Descent of real estate vested in sole trustee or mortgagee.

(*d*) *Ante*, p. 213.

(*e*) *Ante*, p. 52.

(*f*) Page 467, 18th ed.

(*g*) By Stats. 37 & 38 Vict. c. 78, s. 5, and 38 & 39 Vict. c. 87, s. 48, if any person seised of any hereditament in fee simple as a bare trustee died intestate between the 7th August, 1874, and the 31st December, 1881, the same vested like a chattel real in his legal personal representative.

With this exception, before the year 1882, the fact, that a fee was held subject to a trust or mortgage, made no difference in the course of its descent at law. See *ante*, p. 179; Williams's Conveyancing Statutes, 17, 19, 171.

(*h*) Stat. 44 & 45 Vict. c. 41, s. 30, amended by 50 & 51 Vict. c. 78, s. 45; see Williams's Conveyancing Statutes, 170—176; *Re Pilling's Trusts*, 26 Ch. D. 432.

inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to his personal representatives, in like manner as if the same were a chattel real vesting in them.

Succession
and Estate
Duty.

Every person succeeding to any real property as heir is now charged with succession duty, and may be further charged with estate duty in the same manner as a person succeeding under a will (i), and at a rate to be determined, apparently, by his degree of relationship to the last possessor (k).

(i) Stats. 16 & 17 Vict. c. 51, s. 2; 51 Vict. c. 8, s. 21; 52 Vict. c. 7, s. 6; see the end of the next chapter. (k) Not the last purchaser; Hanson on Succession Duties, 239, 240, 3rd ed.

CHAPTER X.

OF A WILL OF LANDS . . . . .	221

THE right of testamentary alienation of lands is a matter depending upon Act of Parliament. We have seen, that previously to the reign of Henry VIII. an estate in fee simple, if not disposed of in the lifetime of the owner, descended, on his death, to his heir at law (*a*). To this rule, gavelkind lands, and lands in a few favoured boroughs, formed exceptions; and the hardship of the rule was latterly somewhat mitigated by the prevalence of conveyances to *uses*; for the Court of Chancery allowed the *use* to be devised by will (*b*). But when the Statute of Uses (*c*) came into operation, and all uses were turned into legal estates, the title of the heir again prevailed, and the inconvenience of the want of testamentary power then began to be felt. To remedy this inconvenience, an Act of Parliament (*d*), to which we have before referred (*e*), was passed six years after the enactment of the Statute of Uses. By this Act, every person having any lands or hereditaments holden in socage, or in the nature of socage tenure, was enabled by his last will and testament in writing, to give and devise the same at his will and pleasure; and those who had estates in fee simple in lands held by knights' service were enabled in the same way to give and devise two-third parts thereof. When, by the statute of 12 Car. II. c. 24 (*f*), socage was made the

Statute of Wills.

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| <p>(<i>a</i>) <i>Ante</i>, p. 70.
 (<i>b</i>) <i>Ante</i>, p. 163.
 (<i>c</i>) Stat. 27 Hen. VIII. c. 10;
 <i>ante</i>, p. 164.
 (<i>d</i>) 32 Hen. VIII. c. 1, ex-</p> | <p>plained by statute 34 & 35 Hen.
 VIII. c. 5.
 (<i>e</i>) <i>Ante</i>, p. 71.
 (<i>f</i>) <i>Ante</i>, p. 51.</p> |
|---|---|

The Statute
of Frauds.

Wills Act.

universal tenure, all estate in fee simple became at once devisable, being all then holden by socage. This extensive power of devising lands by a mere writing unattested was soon curtailed by the Statute of Frauds (*g*), which required that all devises and bequests of any lands or tenements, devisable either by statute or the custom of Kent, or any borough, or any other custom, should be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and should be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they should be utterly void and of none effect. And thus the law continued till the year 1837, when an Act was passed for the amendment of the laws with respect to wills (*h*). By this Act the original statute of Henry VIII. (*i*) was repealed, except as to wills made prior to the 1st of January, 1838, and the law was altered to its present state. This Act permits of the devise by will of every kind of estate and interest in real property which would otherwise devolve to the heir of the testator, or, if he became entitled by descent, to the heir of his ancestor (*j*); but enacts (*k*), that no will shall be valid, unless it shall be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of *two* or more witnesses, present at the same time (*l*); and such witnesses shall attest, and shall subscribe the will in the presence of the testator. One would have thought that this enactment was sufficiently

(*g*) 29 Car. II. c. 3, s. 5.

(*h*) Stat. 7 Will. IV. and 1 Vict. c. 26.

(*i*) 32 Hen. VIII. c. 1.

(*j*) Stat. 7 Will. IV. and 1 Vict. c. 26, s. 8. See *ante*, p. 53, n. (*x*), as to the devise of land, which would otherwise es-

cheat to the lord of the fee.

(*k*) Sect. 9.

(*l*) See *In the goods of Gunston, Blake v. Blake*, 7 P. D. 102; *Wright v. Sanderson*, 9 P. D. 149; *Daintree v. Butcher and Farulo*, 13 P. D. 67, 102.

clear, especially that part of it which directs the will to be signed at the foot or end thereof. Some very careless testators, and very clever judges, have, however, contrived to throw upon this clause of the Act a discredit which it does not deserve. And it has accordingly been enacted (*m*), by way of explanation, that

"Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him, be deemed to be valid, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow, or be immediately after, the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names, or one of the names of the subscribing witnesses, or by the circumstance that a signature shall be on a side or page, or other portion of the paper or papers, containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature; and the enumeration of the above circumstances is not to restrict the generality of the above enactment; but no signature shall be operative to give effect to any disposition or direction which is underneath, or which follows it; nor shall it give effect to any disposition or direction inserted after the signature shall be made" (*n*).

Wills Act
Amendment
Act, 1852.

The unlearned reader will perhaps be of opinion that there is not one of the positions above so laboriously enumerated, that might not very properly have been considered as at the foot or end of the will within the spirit and meaning of the Act; except in the case of a

(*m*) Stat. 15 & 16 Vict. c. 24. 12 P. D. 8.

(*n*) See *Margary v. Robinson*,

large blank being left before the signature, apparently for the purpose of the subsequent insertion of other matter; in which case the fraud to which the will lays itself open would be a sufficient reason for holding it void.

Who may be witnesses.

The Statute of Frauds, it will be observed, required that the witnesses should be credible; and, on the point of credibility, the rules of law with respect to witnesses have, till recently, been very strict; for the law had so great a dread of the evil influence of the love of money, that it would not even listen to any witness who had the smallest pecuniary interest in the result of his own testimony. Hence, under the Statute of Frauds, a bequest to a witness to a will, or to the wife or husband of a witness, prevented such witness from being heard in support of the will; and, the witness being thus incredible, the will was void for want of three credible witnesses. By an Act of Geo. II. (o), a witness to whom a gift was made was rendered credible, and the gift only which was made to the witness was declared void; but the Act did not extend to the case of a gift to the husband or wife of a witness; such a gift, therefore, still rendered the whole will void (p). Under the Wills Act, however, the incompetency of the witness at the time of the execution of the will, or at any time afterwards, is not sufficient to make the will invalid (q); and if any person shall attest the execution of a will, to whom, or to whose wife or husband, any beneficial interest whatsoever shall be given (except a mere charge for payment of debts), the person attesting will be a good witness; but the gift of such beneficial interest to such person, or to the wife or husband of such person,

Wills Act.

(o) Stat. 25 Geo. II. c. 6.

(p) *Hatfield v. Thorpe*, 5 Barn. & Ald. 689; 1 Jarm. on Wills,

71, 72, 4th ed.; 2 Strange, 1255.

(q) Stat. 7 Will. IV. and 1 Vict. c. 26, s. 14.

will be void (r). Creditors, also, are good witnesses, although the will should contain a charge for payment of debts (s); and the mere circumstance of being appointed executor is no objection to a witness (t). By more recent statutes (u), the rule which excluded the evidence of witnesses in Courts of Justice, and of parties to actions and suits, on account of interest, has been very properly abolished; and the evidence of interested persons is now received, and its value estimated according to its worth; but the Wills Act is not affected by these statutes (x). The Courts of Common Law had formerly exclusive jurisdiction in questions arising on the validity of a will of real estate; whilst the Ecclesiastical Courts had the like exclusive jurisdiction over wills of personal estate. But in the year 1857 an Act was passed establishing a Court of Probate (y), of which the jurisdiction was in 1875 transferred to the High Court of Justice, and has since been principally exercised in the Probate, Divorce, and Admiralty Division, where all wills of personal estate are now required to be proved. This Act provided for the citation before the Court of the heir at law of the testator and the devisees of his real estate; and such heir and devisees, when cited, will be bound by the proceedings (z); but this occurs only when a contest is expected or actually takes place. In all ordinary cases, a will, so far as it affects real estate, does not require to be proved (a).

Court of
Probate.

(r) Stat. 7 Will. IV. and 1 Vict. c. 26, s. 15. See *Gurney v. Gurney*, 3 Drew. 208; *Tempest v. Tempest*, 2 Kay & J. 685; *Thorpe v. Bestwick*, 6 Q. B. D. 811.

(s) Sect. 16.

(t) Sect. 17.

(u) Stats. 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99, amended by stats. 16 & 17 Vict. c. 88.

(x) Stats. 6 & 7 Vict. c. 85, s. 1; 14 & 15 Vict. c. 99, s. 5.

(y) Stats. 20 & 21 Vict. c. 77,

amended by stat. 21 & 22 Vict. c. 95.

(z) Stat. 20 & 21 Vict. c. 77, ss. 61, 62, 63. See, per Jessel, M. R., in *Sugden v. Lord St. Leonards*, 1 P. D. 288. These provisions extend only to wills made since the Wills Act. *Campbell v. Lucy*, L. R., 2 P. & D. 209.

(a) *In the goods of Tomlinson*, 6 P. D. 209; *In the goods of Hornbuckle*, 15 P. D. 149.

- Revocation of a will. So much, then, for the power to make a will of lands, and for the formalities with which it must be accompanied. A will, it is well known, does not take effect until the decease of the testator. In the meantime, it may be revoked in various ways; as, by the
- By marriage. marriage of either a man or a woman (*b*); though, before the Wills Act, the marriage of a man was not sufficient to revoke his will, unless he also had a child
- By burning, &c. born (*c*). A will may also be revoked by burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same (*d*). But the Wills Act enacts (*e*) that no obliteration, interlineation, or other alteration, made in any will after its execution, shall have any effect (except so far as the words or effect of the will, before such alteration, shall not be apparent), unless such alteration shall be executed in the same manner as a will; but the signature of the testator, and the subscription of the witnesses, may be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the
- By writing duly executed. end or some other part of the will. A will may also be revoked by any writing, executed in the same manner as a will, and declaring an intention to revoke, or by a
- By subsequent will. subsequent will or codicil (*f*), to be executed as before.

(*b*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 18. "Except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions." *In the goods of Fenwick*, L. R., 1 P. & D. 319; *In the goods of Russell*, 15 P. D. 111.

(*c*) 1 Jarman on Wills, 122, 4th

ed. See *Marston v. Roe & Fox*, 8 Ad. & Ell. 14.

(*d*) Stat. 7 Will. IV. and 1 Vict. c. 26, s. 20. There must be both actual destruction and intent to destroy; *Andrew v. Motley*, 12 C. B., N. S. 514; *Cheese v. Lonsjoy*, 2 P. D. 251; *Mills v. Millward*, 15 P. D. 20.

(*e*) Sect. 21.

(*f*) Stat. 7 Will. IV. and 1 Vict. c. 26, s. 20. See *Hellier v. Hellier*, 9 P. D. 237; *In the goods of Gosling*, 11 P. D. 79.

And where a codicil is added, it is considered as part of By codicil.
the will; and the disposition made by the will is not
disturbed further than is absolutely necessary to give
effect to the codicil (g).

The above are the only means by which a will can Subsequent
now be revoked; unless, of course, the testator choose disposition.
afterwards to part with any of the property comprised
in his will, which he is at perfect liberty to do. In
this case the will is revoked, as to the property parted
with, if it does not find its way back to the testator,
so as to be his at the time of his death. Under the
Statute of Hen. VIII. a will of lands was regarded in
the light of a *present conveyance*, to come into opera-
tion at a future time, namely, on the death of the testator.
And if a man, having made a will of his lands, after-
wards disposed of them, they would not, on returning
to his possession, again become subject to his will,
without a subsequent republication or revival of the
will (h). But, under the Wills Act, no subsequent
conveyance shall prevent the operation of the will, with
respect to such devisable estate or interest as the tes-
tator shall have at the time of his death (i). In the
same manner, the old statute was not considered as After-pur-
enabling a person to dispose by will of any lands, chased lands.
except such as he was possessed of at the time of
making his will: so that lands purchased after the
date of the will could not be affected by any of its
dispositions, but descended to the heir at law (k). This
also is altered by the Wills Act, which enacts (l) that
every will shall be construed, with reference to the
property comprised in it, to speak and take effect as if

(g) 1 Jarman on Wills, 176,
4th ed.

(h) 1 Jarman on Wills, 147, 198,
4th ed.

(i) Stat. 7 Will. IV. and 1
Vict. c. 26, s. 23.

(k) 1 Jarman on Wills, 645,
4th ed.

(l) Stat. 7 Will. IV. & 1 Vict.
c. 26, s. 24; *Re Portal and Lamb*,
30 Ch. D. 50.

A will now speaks from the death of the testator.

General residuary devisee.

it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. So that every man may now dispose, by his will, of all such landed property, or real estate, as he may hereafter possess, as well as that which he now has. Again, the result of the old rule, that a will of lands was a present conveyance, was, that a general devise by a testator of the residue of his lands was, in effect, a specific disposition of such lands and such only as the testator then had, and had not left to any one else (*m*). A general residuary devisee was a devisee of the lands not otherwise left, exactly as if such lands had been given him by their names. The consequence of this was, that if any other persons to whom lands were left died in the lifetime of the testator, the residuary devisee had no claim to such lands, the gift of which thus failed; but the lands descended to the heir at law. This rule is altered by the Act, under which (*n*), unless a contrary intention appear by the will, all real estate comprised in any devise, which shall fail by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

A lapse.

This failure of a devise, by the decease of the devisee in the testator's lifetime, is called a *lapse*; and this lapse is not prevented by the lands being given to the devisee *and his heirs*; and in the same way, before the Wills Act, a gift to the devisee and the *heirs of his body* would not carry the lands to the heir of the body of the devisee, in case of the devisee's decease in the lifetime of the testator (*o*). For the terms *heirs* and *heirs of the body* are words of limitation merely; that is, they

(*m*) 1 Jarman on Wills, 645, c. 26, s. 25.
4th ed.

(*o*) *Hodgson and Wife v. Ambrose*, 1 Dougl. 337.

(*n*) Stat. 7 Will. IV. & 1 Vict.

merely mark out the estate, which the devisee, if living at the testator's death, would have taken,—in the one case an estate in fee simple, in the other an estate tail; and the heirs are no objects of the testator's bounty, further than as connected with their ancestor (*p*). Two cases have, however, been introduced by the Wills Act, in which the devise is to remain unaffected by the decease of the devisee in the testator's lifetime. The first case is that of a devise of real estate to any person for an *estate tail*; in which case, if the devisee should die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*q*). The other case is that of the devisee being a *child or other issue* of the testator dying in the testator's lifetime and leaving issue any of whom are living at the testator's death. In this case, unless a mere life estate shall have been left to the devisee, the devise shall not lapse, but shall take effect as in the former case (*r*).

No lapse now
in two cases.

Estate tail.

Devise to
issue of
testator.

The construction of wills is the next object of our attention. In construing wills, the Courts have always borne in mind, that a testator may not have had the same opportunity of legal advice in drawing his will, as he would have had in executing a deed. And the first great maxim of construction accordingly is, that the intention of the testator ought to be observed (*s*).

Construction
of wills.

Intention to
be observed.

(*p*) Plowd. 345; 1 Rep. 105; 1 Jarm. Wills, 388, 4th ed.
(*q*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 32.

(*r*) Sect. 33. See Principles of the Law of Personal Property, 458, 18th ed.; *Johnson v. Johnson*, 8 Hare, 157; *Eccles v. Cheyne*, 2

Kay & J. 676; *Griffiths v. Gale*, 12 Sim. 354; *Eager v. Furnivall*, 17 Ch. D. 115.

(*s*) 30 Ass. 183 a; Year Book, 9 Hen. VI. 24 b; Litt. 586; Perkins, s. 555; 2 Black. Comm. 381.

The decisions of the Courts, in pursuing this maxim, have given rise to a number of subsidiary rules, to be applied in making out the testator's intention; and, when doubts occur, these rules are always made use of to determine the meaning; so that the true legal construction of a will is occasionally different from that which would occur to the mind of an unprofessional reader. Certainty cannot be obtained without uniformity, nor uniformity without rule. Rules, therefore, have been found to be absolutely necessary; and the indefinite maxim of observing the intention is now largely qualified by the numerous decisions which have been made respecting all manner of doubtful points, each of which decisions forms or confirms a rule of construction, to be attended to whenever any similar difficulty occurs. It is, indeed, very questionable, whether this maxim of observing the intention, reasonable as it may appear, has been of any service to testators; and it has certainly occasioned a great deal of trouble to the Courts. Testators have imagined that the making of wills, to be so leniently interpreted, is a matter to which anybody is competent; and the consequence has been an immense amount of litigation, on all sorts of contradictory and nonsensical bequests. An intention, moreover, expressed clearly enough for ordinary apprehensions, has often been defeated by some technical rule, too stubborn to yield to the general maxim, that the intention ought to be observed. Thus, in one case (*t*), a testator declared his intention to be, that his son should not sell or dispose of his estate, for longer time than his life, and to that intent he devised the same to his son for his life, and after his decease to the heirs of the body of his said son. The Court of King's Bench held, as the reader would no doubt expect, that the son took only an estate for his life; but this decision

Technical
rules.

Example of
an intended
life estate,
held to be an
estate tail.

(*t*) *Perrin v. Blake*, 4 Burr. Dougl. 343.
2579; 1 Sir Wm. Bla. 672; 1

was reversed by the Court of Exchequer Chamber, and it is now well settled that the decision of the Court of King's Bench was erroneous (*u*). The testator unwarily made use of technical terms, which always require a technical construction. In giving the estate to the son for life, and after his decease to the heirs of his body, the testator had, in effect, given the estate to the son *and the heirs of his body*. Now such a gift is an estate tail; and one of the inseparable incidents of an estate tail is, that it may be barred in the manner already described (*x*). The son was, therefore, properly entitled, not to an estate for life only, but to an estate tail, which would at once enable him to dispose of the lands for an estate in fee simple. In contrast to this case are those to which we have before adverted, in the chapter on estates for life (*y*). In those cases, an intention to confer an estate in fee simple was defeated by a construction, which gave only an estate for life; a gift of lands or houses to a person simply, without words to limit or mark out the estate to be taken, was held to confer a mere life interest. But, in such cases, the Courts, conscious of the pure technicality of the rule, were continually striving to avert the hardship of its effect, by laying hold of the most minute variations of phrases, as matter of exception. Doubt thus took the place of direct hardship; till the legislature thought it time to interpose. As we have seen, a remedy was provided by the Wills Act (*z*), which enacts (*a*), that where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a contrary intention shall appear by the will. In these cases, therefore, the rule

An intended fee simple, held to be only an estate for life.

(*u*) Fearn, Cont. Rem. 147 to 172.

(*z*) *Ante*, p. 35.

(*y*) *Ante*, p. 106.

(*s*) 7 Will. IV. & 1 Vict. c. 26.

(*a*) Sect. 28.

of law has been made to give way to the testator's intention; but the case above cited, in which an estate tail was given when a life estate only was intended, is sufficient to show, that rules still remain which give to certain phrases such a force and effect as can be properly directed by those only who are well acquainted with their power.

Gift in case
of death
without issue.

Another instance of the defeat of intention arose in the case of a gift of lands to one person, "and in case he shall die without issue," then to another. The Courts interpreted the words, "in case he shall die without issue," to mean "in case of his death, and of the failure of his issue;" so that the estate was to go over to the other, not only in case of the death of the former, leaving no issue *living at his decease*, but also in the event of his leaving issue, and his issue afterwards failing, by the decease of all his descendants. The Courts considered that a man might properly be said to be "dead without issue," if he had died and left issue, all of whom were since deceased; quite as much as if he had died, and left no issue behind him. In accordance with this view, they held such a gift as above mentioned to be, by implication, a gift to the first person and his issue, with a remainder over, on such issue failing, to the second. This was, in fact, a gift of an estate tail to the first party (b); for an estate tail is just such an estate as is descendible to the issue of the party, and will cease when he has no longer heirs of his body, that is, when his issue fails. Had there been no power of barring entails, this would no doubt have been a most effectual way of fulfilling to the utmost the testator's intention. But, as we have seen, every estate tail in possession is liable to be barred, and turned into a fee simple, at the will of the owner. With this legal incident of such an estate, the Courts

Such a gift
held to be an
estate tail.

(b) 1 Jarm. Wills, 554, 4th ed.; *Macpell v. Wooding*, 8 Sim. 4, 7.

considered that they had nothing to do; and by this construction, they accordingly enabled the first devisee to bar the estate tail which they adjudged him to possess, and also the remainder over to the other party. He thus was enabled at once to acquire the whole fee simple, ^{Intention defeated.} contrary to the intention of the testator, who most probably had never heard of estates tail, or of the means of barring them. This rule of construction had been so long and firmly established that nothing but the power of Parliament could effect an alteration. This was done ^{Wills Act.} by the Wills Act, which directs (c) that in a will the words "die without issue," and similar expressions, shall be construed to mean a want of failure of issue in the lifetime, or at the death of the party, and not an indefinite failure of issue; unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a gift of an estate tail to such person or issue, or otherwise.

From what has been said, it will appear that, before the above-mentioned alteration, an estate tail might have been given by will, by the mere implication, arising ^{Implication.} from the apparent intention of the testator, that the land should not go over to any one else, so long as the first devisee had any issue of his body. In the particular class of cases to which we have referred, this implication is now excluded by express enactment. But the general principle by which any kind of estates may be given by will, whenever an intention so to do is expressed, or clearly implied, still remains the same. In a deed, technical words are always required; to create an estate tail by a deed, it is necessary, as we have seen (d), that the word *heirs*, coupled with *words of procreation*, such as *heirs of the body*, or the words *in tail*, should be

(c) Sect. 29.

(d) *Ante*, pp. 141, 198.

Gift of an
estate tail by
will.

made use of. So, we have seen that, to give an estate in fee simple, it is necessary, in a deed, to use the word *heirs*, or the words *in fee simple* (*f*), as words of limitation, to limit or mark out the estate. But in a will, a devise to a person and his seed (*g*), or to him and his issue (*h*), and many other expressions, are sufficient to confer an estate tail; and a devise to a man and his *heirs male*, which, in a deed, would be held to confer a fee simple (*i*), in a will gives an estate in tail male (*k*); for the addition of the word "male," as a qualification of heirs, shows that a class of heirs, less extensive than heirs general, was intended (*l*); and the gift of an estate in tail male, to which, in a will, words of procreation are unnecessary, is the only gift which at all accords with such an intention. So, even before the enactment directing that a devise without words of limitation should be construed to pass a fee simple, an estate in fee simple was often held to be conferred, without the use of the word *heirs*. Thus, such an estate was given by a devise to one in *fee simple*, or to him *for ever* or to him *and his assigns for ever* (*m*), or by a devise of all the testator's *estate*, or of all his *property*, or all his *inheritance*, and by a vast number of other expressions, by which an intention to give the fee simple could be considered as expressed or implied (*n*).

Gift of a fee
simple by
will.

Uses and
trusts.

The doctrine of uses and trusts applies as well to a will as to a conveyance made between living parties. Thus, a devise of lands to A. and his heirs to the use of B. and his heirs, upon certain trusts to be performed by B., will vest the legal estate in fee simple in B.; and the Court will compel him to execute the trust;

(*f*) *Ante*, pp. 141, 198.

(*g*) Co. Litt. 9 b; 2 Black. Comm. 115.

(*h*) *Martin v. Swannell*, 2 Beav. 249; 2 Jarm. Wills, 412, 4th ed.

(*i*) *Ante*, p. 141.

(*k*) Co. Litt. 27 a; 2 Black.

Comm. 115.

(*l*) 2 Jarm. Wills, 324, 4th ed.

(*m*) Co. Litt. 9 b; 2 Black.

Comm. 108.

(*n*) 2 Jarm. Wills, 274 *et seq.*, 4th ed.

unless, indeed, he disclaim the estate, which he is at perfect liberty to do (*o*). But, if any trust or duty should be imposed upon A., it will then become a question, on the construction of the will, whether or not A. takes any *legal* estate; and, if any, to what extent. If no trust or duty is imposed on him, he is a mere instrument for conveying the legal estate to B., filling the same passive office as a person to whom a feoffment or conveyance has been made to the use of another (*p*). From a want of acquaintance on the part of testators with the Statute of Uses (*q*), great difficulties have frequently arisen in determining the nature and extent of the estates of trustees under wills. In doubtful cases, the leaning of the Courts was to give to the trustees no greater estate than was absolutely necessary for the purposes of their trust. But this doctrine having frequently been found inconvenient, provision has been made in the Wills Act (*r*), that, under certain circumstances, not always to be easily explained, the fee simple shall pass to the trustees, instead of an estate determinable when the purposes of the trust shall be satisfied.

The above examples may serve as specimens of the great danger a person incurs, who ventures to commit the destination of his property to a document framed in ignorance of the rules, by which the effect of such document must be determined. The Wills Act, by the alterations above mentioned, has effected some improvement; but no Act of Parliament can give skill to the unpractised, or cause everybody to attach the same meaning to doubtful words. The only way, therefore,

(*o*) *Nicholson v. Wordsworth*, 2 Swanst. 385; *Urch v. Walker*, 3 Mylne & Craig, 702; *Siggers v. Evans*, 5 E.J. & Bl. 367, 380.
(*p*) 2 Jarm. Wills, 290, 291, 4th ed.; *Baker v. White*, L. R.,

20 Eq. 166; see *ante*, p. 166.
(*q*) 27 Hen. VIII. c. 10; *ante*, p. 164.
(*r*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 30, 31.

Danger of
ignorance of
legal rules.

to avoid doubts on the construction of wills, is to word them in proper technical language,—a task to which those only who have studied such language can be expected to be competent.

Devise to heir.

If the testator should devise land to the person who is his heir at law, it is provided by the "Act for the Amendment of the Law of Inheritance" (s) that such heir shall be considered to have acquired the land as a devisee, and not by descent. Such heir, thus taking by *purchase* (t), will, therefore, become the stock of descent; and in case of his decease intestate, the lands will descend to *his* heir, and not to the heir of the testator, as they would have done had the lands *descended* on the heir. Before this Act, an heir to whom lands were left by his ancestor's will was considered to take by his prior title of descent as heir, and not under the will,—unless the testator altered the estate and limited it in a manner different from that in which it would have descended to the heir (u).

Devise of real estate is independent of executors' assent.

Charge of debts.

It is usually the practice, as is well known, for every testator to appoint an executor or executors of his will; and the executors so appointed have important powers of disposition over the personal estate of the testator (x). But the devise of the real estate of the testator is quite independent of the executors' assent or interference, unless the testator should either expressly or by implication have given his executors any estate in or power over the same. In modern times, however, the doctrine has been broached, that if a testator charges his real estate with the payment of his debts, such a charge gives by implication a power to his executors to sell his

(s) Stat. 3 & 4 Will. IV. c. 106, s. 3; see *Strickland v. Strickland*, 10 Sim. 374.

(t) *Ante*, p. 203.

(u) Watk. Descents, 174, 176 (329, 331, 4th ed.)

(x) Principles of the Law of Personal Property, 423, 13th ed.

real estate for the payment of his debts. The author has elsewhere attempted to show that this doctrine, though recognized in several modern cases, is inconsistent with legal principles (*y*); and in this he has since been supported by the great authority of Lord St. Leonards (*z*). In consequence, however, of the difficulties to which these cases gave rise, an Act has passed by which, where there is a charge of debts or legacies, the trustees in some cases and in other cases the executors of a testator are empowered to sell his real estate for the purpose of paying such debts or legacies. This Act, which is known as "Lord St. Leonards' Act" (*a*), provides (*b*) that where, by any will that shall come into operation after the passing of the Act, the testator shall have charged his real estate or any specific portion thereof with the payment of his debts or of any legacy, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debts or legacy out of the estate, such trustee or trustees may, notwithstanding any trusts actually declared by the testator, raise such debts or legacy by sale or mortgage of the lands devised to them. But if any testator, who shall have created such a charge, shall not have devised the hereditaments charged in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in his will (if any) shall have the same power of raising the same moneys as is before vested in the trustees (*c*). And

Where trustees may sell or mortgage to pay testator's debts or legacies.

Where executors may sell or mortgage to pay debts or legacies.

(*y*) See the Author's Essay on Real Assets, c. 6.

(*z*) Sug. Pow. 120—122, 8th ed.

(*a*) Stat. 22 & 23 Vict. c. 35, passed 18th August, 1859.

(*b*) Sect. 14. The powers thus conferred extend to all persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, and

to any persons appointed to succeed to the trusteeship, either under any power in the will, or by the Court; s. 15.

(*c*) Sect. 16. Such power shall from time to time devolve to the person or persons (if any) in whom the executorship shall for the time being be vested.

purchasers or mortgagees are not to be bound to inquire whether the powers thus conferred shall have been duly exercised by the persons acting in exercise thereof (*d*). But these provisions are not to prejudice or affect any sale or mortgage made or to be made in pursuance of any will coming into operation before the passing of the Act; nor are they to extend to a devise to any person in fee or in tail, or for the testator's whole estate and interest, charged with debts or legacies; nor are they to affect the power of any such devisee to sell or mortgage as he or they may by law now do (*e*). In these cases the law is that the devisee may, in the exercise of his inherent right of alienation, either sell or mortgage the lands devised to him; but if legacies only are charged thereon, the purchaser or mortgagee is bound to see his money duly applied in their payment (*f*). If, however, the testator's debts are charged on the lands, then, whether there be legacies also charged or not, the practical impossibility of obliging the purchaser or mortgagee to look to the payment of so uncertain a charge exonerates him from all liability to do more than simply pay his money to the devisee on his sole receipt (*g*).

Devise in fee or in tail charged with debts.

Charges of legacies only.

Charge of debts.

Executors now take freeholds vested in a sole trustee or mortgagee: and a power to convey real estate contracted to be sold.

As we have seen, under the Conveyancing Act of 1881 (*h*), freehold estate of inheritance vested in any person solely upon any trust, or by way of mortgage, now devolves, on his death, to his personal representatives. And by the same Act (*i*), where, at the death of any person, there is subsisting a contract enforceable

(*d*) Sect. 17.

(*e*) Sect. 18. See *Re Wilson*, 2 Times L. R. 448; 34 W. R. 512.

(*f*) *Horn v. Horn*, 2 Sim. & Stu. 448; Essay on Real Assets, p. 63.

(*g*) Essay on Real Assets, pp. 62, 63; *Corsar v. Cartwright*, L. R., 7 H. of L., E. & I. 731.

(*h*) Stat. 44 & 45 Vict. c. 41, s. 80, amended by 50 & 51 Vict. c. 78, s. 45; *ante*, pp. 179, 219; see Williams's Conveyancing Statutes, 170—176; *Re Pilling's Trusts*, 28 Ch. D. 432.

(*i*) Sect. 4; see Williams's Conveyancing Statutes, 54—58.

against his heir or devisee, for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his personal representatives shall, by virtue of the Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract; but a conveyance made under this enactment is not to affect the beneficial rights of any person claiming under any testamentary disposition, or as heir, or next of kin, of a testator or an intestate.

Wills of lands situate in Middlesex or Yorkshire or the town and county of Kingston-upon-Hull, must be duly registered in the county register, in order to operate as a complete and unavoidable conveyance. For the Registry Acts for those places (*k*) provided that a memorial of all wills of lands in those counties should be registered within six months after the death of every testator dying within the kingdom of Great Britain, or within three years after the death of every testator dying upon the seas or in parts beyond the seas; otherwise every such devise by will should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration (*l*). But in consequence of the construction placed upon these Acts by the Courts of Equity (*m*), if a purchaser or mortgagee from the heir of one, who held land in a register county, had had clear previous notice of a will devising the same land, he could not, by registering his deed, gain any priority over the devisees in respect of the equitable estate in the land (*n*). The Vendor and

Wills in Middlesex and Yorkshire to be registered.

(*k*) Stats. 7 Anne, c. 20, s. 8; 2 & 3 Anne, c. 4, s. 20; 6 Anne, c. 62 (6 Anne, c. 35, in Ruffhead); 8 Geo. II. c. 6, s. 15. See *ante*, p. 194; Williams's Conveyancing Statutes, 21—23.

(*h*) *Chadwick v. Turner*, 34

Beav. 634; affirmed L. R., 1 Ch. 810; Dart's Vendors and Purchasers, 771, 6th ed.

(*m*) See *ante*, p. 197.

(*n*) Williams's Conveyancing Statutes, 21, and *n.* (*g*).

New enactment, relief to purchasers and mortgagees.

Purchaser Act, 1874 (*o*), provides (*p*), that where the will of a testator devising lands in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee, or by some one deriving title under him, shall, if registered before, take precedence of and prevail over, any assurance from the testator's heir at law. As we have seen (*q*), the old Yorkshire Registry Acts were repealed by the Yorkshire Registries Act, 1884 (*r*). By this Act, wills affecting lands in Yorkshire *may be* registered thereunder; and every will entitled to be registered under this Act shall have priority according to the date of the death of the testator, if the date of registration thereof be within, or under this Act to be deemed to be within (*s*), a period of six months after the death of the testator, or according to the date of registration thereof, if such date of registration be not within, or under this Act to be deemed to be within, such period of six months (*t*). This Act also provides for the registration of an affidavit of intestacy at any time after the expiration of six months from the death of a person holding land within Yorkshire and Kingston-upon-Hull; and enacts that, where any such affidavit of intestacy has been duly registered, any assurance for valuable consideration made or executed by any person who would be empowered to make or execute the same in case of such intestacy, and duly registered, shall have priority over any will of the supposed intestate, the date of registration of which shall be subsequent to the date of registration of such assurance *or will* and not within or under this Act to

Registration in Yorkshire of affidavit of intestacy.

Sic.

- (*o*) Stat. 37 & 38 Vict. c. 78.
- (*p*) Sect. 8. See Williams's Conveyancing Statutes, 21—24.
- (*q*) *Ante*, p. 197.
- (*r*) Stat. 47 & 48 Vict. c. 54, s. 51.
- (*s*) See sect. 11, which provides

for registration of notice of a will within six months after the testator's death, if the will itself cannot be registered within the same period.
(*t*) Sects. 4, 14, as amended by 48 & 49 Vict. c. 26, s. 4.

be deemed to be within a period of six months after the death of the supposed intestate (*u*). As we have seen (*x*), this Act provides that no person claiming any legal or equitable interest under any priority given by the Act shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud.

As a rule, every person succeeding to any beneficial interest in real property under a will, upon any death which has occurred after the Succession Duty Act, 1853 (*y*), is charged with duty on the value of the succession at the rate stated in the note (*z*). Succession duty is a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property on which it is assessed; and is also a debt due to the Crown from the successor, having, in the case of real property comprised in any succession, priority over all charges and interests created by him (*a*). The interest of a successor to real property is considered to be of the value of an annuity equal to the annual value (*b*) of such property during his life, or for any

(*u*) Sect. 12. The words *or will* appear superfluous.

(*x*) *Ante*, p. 197.

(*y*) Stat. 16 & 17 Vict. c. 51, ss. 2, 10, 18, 54; this Act commenced on the 19th May, 1853.

(*z*) Where the successor is to the predecessor (who in the present case is the testator):—

(1) Lineal issue or ancestor, £1 per cent.

(2) Brother or sister, or descendant of a brother or sister, £3 per cent.

(3) Brother or sister of the father or mother, or descendant of such brother or sister, £5 per cent.

(4) Brother or sister of the grandfather or grandmother, or descendant of such brother or sister, £6 per cent.

(5) In any other degree of collateral consanguinity, or a stranger in blood, £10 per cent.

Besides which an additional duty of 10s. per cent. in case (1), and £1 10s. per cent. in the other cases, is imposed on successions on deaths occurring on or after the 1st of July, 1888; stat. 51 Vict. c. 8, s. 21.

No duty is payable on a succession by a husband to a wife, or vice versa, or by any member of the royal family.

(*a*) Stat. 16 & 17 Vict. c. 51, s. 42; see also s. 44, and stat. 52 Vict. c. 7, s. 12. (*b*) *A.-G. v. Earl of Sefton*, 11 H. L. C. 257.

less period during which he may be entitled ; and every such annuity is to be valued according to tables given in the Act ; and the duty is to be paid by eight equal half-yearly instalments, commencing at the end of twelve months after the successor shall have become entitled to the beneficial enjoyment of the property (c). But if the successor shall die before all such instalments shall have become due, then any instalment not due at his decease shall cease to be payable ; except in the case of a successor who shall have been competent to dispose by will (d) of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest in exoneration of his other property, and shall be payable by the owner for the time being of such interest (e).

Estate Duty. Where the value of any succession upon the death of any person dying between the 1st of June, 1889 and the 31st of May, 1896 (both inclusive), exceeds ten thousand pounds, and where the value of any succession to real property under the will or intestacy of any person so dying, together with any other benefit taken by the successor under such will or intestacy, exceeds the same sum, a further duty of £1 per cent. (called estate duty) is imposed (f).

(c) By stat. 51 Vict. c. 8, s. 22, the successor has the option of paying half the succession duty by four equal annual instalments, commencing at the end of a year after entering upon enjoyment, and the other half either upon the day of payment of the last of such instalments, or by four further

annual instalments with interest at £4 per cent. on the amount remaining unpaid.

(d) *A.-G. v. Hallett*, 2 H. & N. 368.

(e) Stat. 16 & 17 Vict. c. 51, s. 21.

(f) Stat. 52 Vict. c. 7, ss. 6, 7.

CHAPTER XI.

OF CREDITORS' RIGHTS.

IN the present chapter it is proposed to consider the rights, which creditors may acquire, to take freeholds in their debtors' possession to satisfy their debts. The liability of an estate of freehold to alienation for debt has been already briefly noticed (a); and we have seen that it may arise either in the tenant's lifetime, or, in the case of estates of inheritance, after his death. Alienation for ordinary debts may take place in the tenant's lifetime, either in execution of a judgment against him or on his bankruptcy. But in the case of debts to the Crown, the debtor's lands may be taken, as well in his lifetime as after his death, under the special remedies, which the Crown has for the recovery of its debts. We will examine, first, the liability of an estate in fee simple to alienation for debt; then that of estates tail and of freehold estates not of inheritance; and will consider, lastly, the liability of trust estates to creditors.

First, then, with regard to the liability attached to an estate in fee simple to be seized for the tenant's debts in his lifetime, the mere contracting of a debt (except, as we shall see, to the Crown) gives the creditor no charge on the debtor's property, but only the right to sue him personally (b). And it is not until the creditor has obtained the *judgment* of a court of justice in his favour that the debtor's property can be taken, in

Liability in respect of judgment debts.

(a) *Ante*, p. 76.

(b) Turner, L. J., *Johnson v. Gailagher*, 3 De G. F. & J. 494, 519, 520; James, L. J., *Pike v. Fitzgibbon*, 17 Ch. D. 454, 461.

Judgment
debts.

execution of the judgment (c), to satisfy his claim. In our law, the judgment debts of a tenant in fee long affected his lands with a peculiar and extensive liability to be taken in execution, not only in his own hands, but also in the hands of purchasers from him. At the present time, however, a course of complicated legislation has ended in placing such restrictions on the exercise of judgment creditors' rights against their debtor's lands, as reduce to a *minimum* the possibility of any hardship being caused to a purchaser for value. The first enactment which gave to a judgment creditor a remedy against the lands of his debtor was made in the reign of Edward I. (d), shortly before the passing of the Statute of *Quia Emptores* (e), which sanctioned the full and free alienation of fee simple estates. By this enactment it is provided, that, when a debt is recovered or acknowledged in the King's Court (f), or damages awarded, it shall be thenceforth *in the election* of him that sueth for such debt or damages to have a writ of *feri facias* unto the sheriff of the lands and goods (g), or that the sheriff deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough (h), and *the one half of his land*, until the debt be levied according to a reasonable price or extent. The writ issued by the Court to the sheriff, under the authority of this statute, was called a writ of *elegit*; so named, because it was stated in the writ that the creditor had elected (*elegit*) to pursue the remedy which the statute had thus provided for him (i). One moiety only of the land was

(c) See *ante*, p. 28, n. (x).

(d) Stat. 18 Edw. I. c. 18, called the Statute of Westminster the Second.

(e) Stat. 18 Edw. I. c. 1.

(f) *Ante*, p. 9, n.

(g) As to the writ of *feri facias*, see Williams on Personal Property, 69, 13th ed.

(h) Since the commencement of

the year 1884, it has no longer been possible to take the *goods* of a debtor under a writ of *elegit*, and the writ has extended to lands and hereditaments only; see stat. 46 & 47 Vict. c. 52, s. 146, sub-s. 1; Williams on Personal Property, 71, 13th ed.

(i) Co. Litt. 289 b; Bac. Abr. tit. Execution (C 2).

allowed to be taken, because it was necessary, according to the feudal constitution of our law, that, whatever were the difficulties of the tenant, enough land should be left him to enable him to perform the services due to his lord (*j*). The statute, it will be observed, was passed prior to the time when the alienation of estates in fee simple was sanctioned by Parliament; and there can be no doubt, that long after the passing of this statute the vendors and purchasers of landed property held a far less important place in legal consideration than they do at present. This circumstance may account for the somewhat harsh construction, which was soon placed on this statute, and which continued to be applied to it, until its replacement by an enlarged and amended Act of modern date (*k*). It was held, that, if at the time when the judgment of the Court was given for the recovery of the debt, or awarding the damages, the debtor had lands, but afterwards sold them, the creditor might still, under the writ with which the statute had furnished him, take a moiety of the lands out of the hands of the purchaser (*l*). It thus became important for all purchasers of lands to ascertain, that those from whom they purchased had no *judgments* against them. For, if any such existed, one moiety of the lands would still remain liable to be taken out of the hands of the purchaser to satisfy the judgment debt or damages. It was also held that if the debtor purchased lands after the date of the judgment, and then sold them again, even these lands would be liable, in the hands of the purchaser, to satisfy the claims of the creditors under the writ of *elegit* (*m*). In consequence of the construction thus put upon the statute, judgment debts became incumbrances upon the title to every estate in fee simple,

Construction
of the statute.

(*j*) Wright's Tenures, 170.

(*k*) Stat. 1 & 2 Vict. c. 110.

(*l*) *Sir John de Moleyn's case*,
Year Book, 30 Edw. III. 24 a.

(*m*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 492; Sug. V. & P. 520, 14th ed.; Prest. Abst. 323, 331, 332.

which it was necessary to discover and remove previously to every purchase. To facilitate purchasers and others in their search for judgments, an alphabetical docket or index of judgment was provided by an Act of William and Mary (*n*), to be kept in each of the Courts, open to public inspection and search. But, by an enactment of the present reign (*o*) these dockets have now been closed, and the ancient statute is, with respect to purchasers, virtually repealed (*p*).

Dockets.

• Now closed.

Stat. 1 & 2
Vict. c. 110.

The whole of
the lands can
be taken.

The rights of judgment creditors against the lands of their debtors, were remodelled by an Act of Parliament passed in the year 1838, for the purpose of extending the remedies of creditors against the property of their debtors (*q*). The old statute extended to only one half of the lands of the debtor; but, by this Act, the whole of the lands, and all other hereditaments of the debtor, can be taken under the writ of *elegit* (*r*). The power of the judgment creditor to take lands out of the hands of purchasers was no longer left to depend on a forced construction, such as that applied to the old statute; for this Act expressly extends the remedy of the judgment creditor to lands of which the debtor shall *have been* seized or possessed at the time of entering up the judgment, *or at any time afterwards*. It was also expressly provided that a judgment should operate as a charge on such lands; to enforce which the judgment creditor was given a remedy in equity, that is, in the Court of Chancery (*s*). But no judgment should by virtue of this Act affect any hereditaments as to purchasers, mortgagees, or creditors, unless registered against the

Registry of
judgments.

(*n*) Stat. 4 & 5 Will. & Mary, c. 20, made perpetual by stat. 7 & 8 Will. III. c. 36

(*o*) Stat. 2 & 3 Vict. c. 11, ss. 1, 2.

(*p*) See 1 Dart, V. & P. 525—530, 6th ed.

(*q*) Stat. 1 & 2 Vict. c. 110, amended by stats. 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15; and 23 & 24 Vict. c. 83.

(*r*) Sect. 11.

(*s*) Sect. 13.

debtor's name in an Index which the Act directed to be kept for the warning of purchasers, at the office of the Court of Common Pleas (*t*). This registration was required to be repeated every five years (*u*); but the purchaser was bound if the judgment were registered within five years before the execution of the conveyance to him, although more than five years should have elapsed since the last previous registration (*x*). If, however, the judgment were not so registered, or re-registered, the purchaser was not affected thereby, even though he should have had express notice of its existence (*y*). And, by a further enactment, it was provided, in favour of purchasers without notice of any judgments, that no judgments should bind or affect any lands, tenements, or hereditaments, or any interest therein, as against such purchasers without notice, further or otherwise, or more extensively in any respect, although duly registered, than a judgment of one of the superior Courts would have bound such purchasers before the last-mentioned Act, when it had been duly docketed according to the law then in force (*z*). The effect of judgments under these provisions was extended to all decrees, orders or rules, made by the courts of equity and of common law, or in matters of bankruptcy or lunacy (*a*).

Re-registration.

Notice immaterial.

Protection to purchasers without notice.

(*t*) Stats. 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11, s. 2; 19 & 19 Vict. c. 15, s. 10; Sug. V. & P. 530 *et seq.*, 14th ed.

(*u*) Stat. 2 & 3 Vict. c. 11, s. 4.

(*x*) Stat. 18 & 19 Vict. c. 15, s. 6.

(*y*) Stats. 3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4, 5. But the judgment creditor did not, by omitting to re-register, necessarily lose his priority, if once obtained, over subsequent judgments, though duly registered; *Beavan v. The Earl of Oxford*, 6 De G., M. & G. 492; *Re Lord*

Kensington, 25 Ch. D. 527.

(*z*) Stat. 2 & 3 Vict. c. 11, s. 5; *Lane v. Jackson*, 20 Beav. 535.

(*a*) Stats. 1 & 2 Vict. c. 110, s. 18; 2 & 3 Vict. c. 11, ss. 4, 5; 3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4—6. See *Jones v. Williams*, 11 A. & E. 157; 8 M. & W. 349; *Dos v. Amey*, 8 M. & W. 565; *Wells v. Gibbs*, 8 Beav. 399; *Duke of Beaufort v. Phillips*, 1 De G. & S. 521. As to entering satisfaction on judgments, see stat. 23 & 24 Vict. c. 115, s. 2.

Later Acts
abolishing
lien of
judgments.

Subsequent legislation has, however, very greatly modified the effect of the enactments, which rendered a registered judgment a charge on lands in the hands of purchasers. It was first provided, by an Act passed on the 23rd of July, 1860 (*b*), that no judgment to be entered up after the passing of the Act should affect any land as to a *bond fide* purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee had notice or not of such judgment), unless a writ or other due process of execution of such judgment should have been issued and registered against the judgment creditor's name (*c*) in the Index provided by the Act before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him. And no such judgment, nor any writ of execution or other process thereon, was to affect any land as to a *bond fide* purchaser or mortgagee, although execution or other process should have issued thereon and have been duly registered, unless such execution or other process should be executed and put in force within three calendar months from the time when it was registered. By a later Act, passed on the 29th of July, 1864 (*d*), no judgment (*e*) to be entered

(*b*) Stat. 23 & 24 Vict. c. 38, ss. 1, 2.

(*c*) In consequence of this provision it was still necessary to search for judgments against the

debtor's name in the registry above referred to.

(*d*) Stat. 27 & 28 Vict. c. 112, s. 1.

Recogni-
zances.

(*e*) Including registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment; s. 2. The provisions of this Act, and of the previous Act of 1860, also extend to recognizances and statutes. A recognizance is an obligation entered into before some court of record or magistrate duly authorized, whereby one acknowledges himself to owe to the Queen or some other a certain sum, and conditioned to be void on the happening of a particular event, as, if he or some other appear in court when required, keep the peace or pay a debt. Before the Act of 1860, recognizances duly enrolled bound all lands which the debtor had at the time or after; see stats. 13 Edw. I. c. 18; 29 Car. II. c. 3, s. 18; Bro. Abr. Recognisances, 4, 7; Bac. Abr. Execution (B); 2 Black. Comm. 341; 2 Wms. Saund. 9 a, n. (5); 2 Tidd's Practice, 1088, 9th ed.; Parke, B., *E. v. Ellis*, 4 Ex. 662,

up after the passing of the Act shall affect any land, of whatever tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, in pursuance of such judgment. Under this Act, the judgment creditor acquires no right in the judgment debtor's lands until possession thereof has been delivered to him by the sheriff under the writ of *elegit* (*f*), or until he has got the sheriff's return to the writ, whereby the debtor's estate in the lands becomes vested in him; and the priorities of judgment creditors are determined by the dates on which their writs were placed in the sheriff's hands (*g*). The Act required every writ, by virtue whereof any land *should have been* actually delivered in execution, to be registered against the debtor's name, and provided that no other registration of the judgment should be necessary for any purpose (*h*). In 1879 the registers of judgments and of writs of execution were transferred to the Central Office of the Supreme Court, where all subsequent registrations and searches were required to be made (*i*). It was, however, decided under the Act of 1864 that the actual delivery in execution of any land was not avoided, although the writ were not subsequently registered (*j*). But it has since been provided by the Land Charges Registration and Searches Act, 1888 (*k*), that every writ or order affecting

662; 2 Wms. Exors., pt. iii., bk. ii., ch. ii., § ii. 3. Statutes merchant and staple, and recognizances in the nature of a statute Merchant and Staple. Statutes staple were modes of charging lands with the payment of a debt under certain statutes, which, having long been obsolete, were repealed in 1868. See 2 Black. Comm. 160; 2 Wms. Exors. *ubi sup.*; stat. 26 & 27 Vict. c. 125.

(*f*) *Re Hobson*, 38 Ch. D. 493.

(*g*) *Guest v. Cowbridge Railway Co.*, L. R. 6 Eq. 619; *Hatton v. Haywood*, L. R. 9 Ch. 229, 236; *Re Pope*, 17 Q. B. D. 743, 745, 751.

(*h*) Stat. 27 & 28 Vict. c. 112, s. 3.

(*i*) See Williams's Conveyancing

Statutes, 262—274.

(*j*) *Re Pope*, 17 Q. B. D. 743. It was considered that registration was chiefly required for the purpose of obtaining an order for sale under section 4 of the Act; see below, p. 253.

(*k*) Stat. 51 & 52 Vict. c. 51, ss. 4, 5, 6.

land (including hereditaments of any tenure) issued or made by any Court for the purpose of enforcing a judgment (*l*), and every delivery in execution or other proceeding taken in pursuance of any such writ or order shall be void, *as against a purchaser for value* (*m*) of the land, unless the writ or order is for the time being duly registered against the name of the person whose land is affected, in the Office of Land Registry (*n*). Such registration of a writ or order has the same effect as and makes unnecessary registration thereof in the Central Office of the Supreme Court in pursuance of any other Act (*o*). Registration under this Act ceases to have effect at the expiration of five years, but may be renewed, and, if renewed, has effect for five years from the date of renewal (*p*). Due provision is made for searches in the register established by this Act (*q*).

Summary of
the law of
judgments.

It appears from this long chain of legislation that a judgment creditor can now take under the writ of *elegit* all hereditaments belonging to his debtor at the time of the judgment or at any time after; that judgments entered up on (*r*) or after the 29th of July, 1864, are not a charge on the debtor's land until it has been actually delivered in execution; and that even actual delivery in execution of any land is now void as against a purchaser for value, unless the writ be duly registered. Judgments entered up between the 23rd of July, 1860, and the 28th of July, 1864, both inclusive, are not a charge

(*l*) Including any order or decree having the effect of a judgment, except an order made by a court having jurisdiction in bankruptcy in exercise of that jurisdiction; s. 4.

(*m*) Including a mortgagee or lessee, or other person who for valuable consideration takes any interest in or a charge on land.

(*n*) The registration of a writ or order affecting land may be

vacated pursuant to an order of the High Court or a judge; stat. 53 & 54 Vict. c. 69, s. 19.

(*o*) Sect. 5, sub-s. 4.

(*p*) Sect. 5, sub-s. 8.

(*q*) Sects. 15—17.

(*r*) Acts of Parliament take effect from the first instant of the day on which they are passed; *Tomlinson v. Bullock*, 4 Q. B. D. 231. See, too, Sug. V. & P. 530.

on land, until a writ or other process of execution be duly registered: nor unless such writ or process be put in force within three months after registration. But judgments entered up before the 23rd of July, 1860, may still be a charge on land (s).

Lands in either of the counties palatine of Lancaster or Durham were affected both by judgments of the Courts at Westminster, and also by judgments of the Palatine Court (t). These latter judgments had, within the county palatine, the same effect as judgments of the Courts at Westminster; and an index for their registration was established in each of the counties palatine, similar to the index of judgments at the Common Pleas (u). And by an Act of 1855 (x) it was provided that no judgment, decree, order or rule of *any Court* should bind lands in the counties palatine, as against purchasers, mortgagees, or creditors, unless duly registered and re-registered in the Court of the county palatine in which the lands were situate. But the Acts of 1860, 1864 and 1888, altering the law of judgments (y), apply to lands in the counties palatine as well as elsewhere in England (z). Under the Middle-

Counties
palatine.

(s) Before that date it was a common practice to enter up judgment by consent as security for payment of a debt; see *Principles of the Law of Personal Property*, 141—144, 13th ed. Judgments entered up before the 23rd of July, 1860, may have been kept alive, so as to prevent their being barred by lapse of time, under stat. 37 & 38 Vict. c. 57, s. 8 (see *Re Tynte*, 15 Ch. D. 125), by payment of some principal or interest, or by acknowledgment in writing

duly signed, or, it seems, by due application to the Court for the purpose. See *Shelford's Real Property Statutes*, 237, 238, 8th ed.; *Archbold's Queen's Bench Practice*, 955, 14th ed.; *Rules of the Supreme Court*, 1883, Order xlii., rules 20—23.

(t) 2 Wms. Saund. 194.

(u) Stats. 1 & 2 Vict. c. 110, s. 21; 13 & 14 Vict. c. 43, s. 24.

(x) Stat. 18 & 19 Vict. c. 15, ss. 2, 3.

(y) *Ante*, pp. 248—250.

(z) In 1886 the palatinate jurisdiction within the county of Durham, which formerly belonged to the Bishop of Durham, was transferred to the Crown; stats. 6 & 7 Will. IV. c. 19; 21 & 22 Vict. c. 45. By the Judicature Acts of 1873—5, the jurisdiction of the Court of Common Pleas at Lancaster and of the Court of Pleas at Durham was transferred to the High Court of Justice; and that of the Lancaster Chancery

Lands in
Middlesex
and York-
shire.

Judgments
of inferior
courts.

Remedies of
execution
creditor.

Tenant by
elegit.

sex and Yorkshire Registry Acts (*a*), before judgments could affect lands in either of those counties, they were required to be registered in the county register. But the necessity for so registering judgments appears to have been removed by the Act of 1864, depriving subsequent judgments of their lien on lands (*b*). Under the Yorkshire Registries Act, 1884 (*c*), however, it seems that an execution creditor should register his writ in Yorkshire in order to secure undisputed priority over any subsequent assurance of the land (*d*). Judgments of county courts and other inferior courts must be removed into the High Court before they can affect freehold lands (*e*). And judgments of the superior (*f*) and of certain inferior (*g*) courts in England, Scotland or Ireland may now be rendered as effectual as judgments of similar courts in any other part of the United Kingdom.

Here we may advert to the means by which a judgment creditor, who has taken his debtor's lands in execution, may realise his debt. First, he may hold the lands, as tenant by *elegit*, until the debt be satisfied

Court of Appeal to the Court of Appeal, which is a branch of the Supreme Court; stats. 36 & 37 Vict. c. 66, ss. 16—18; 37 & 38 Vict. c. 83. But the Courts of Chancery of the counties palatine of Lancaster and Durham still exercise jurisdiction; see stats. 13 & 14 Vict. c. 43; 17 & 18 Vict. c. 82; *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150, as to Lancaster; 52 & 53 Vict. c. 47, as to Durham. Lands in the county palatine of Chester, and in the principality of Wales, were in 1830 placed exclusively within the jurisdiction of the Courts at Westminster, stat. 11 Geo. IV. & 1 Will. IV. c. 70, s. 14.

(*a*) Stats. 7 Anne, c. 20, s. 18, as to Middlesex; 6 Anne, c. 20, s. 5 (5 & 6 Anne, c. 18, s. 4 in Ruffhead) as to the West Riding of Yorkshire; 6 Anne, c. 62, s. 19 (6 Anne, c. 35, s. 19, in Ruffhead), as to the East Riding; 8 Geo. II. c. 6, s. 1, as to the North Riding; see *Benham v. Keane*, 8 De G. F. & J. 818.

(*b*) Stat. 27 & 28 Vict. c. 112, s. 3; *ante*, p. 248.

(*c*) Stat. 47 & 48 Vict. c. 54

ss. 3, 4—6, 14,

(*d*) See Elphinstone and Clark on Searches, 189—141.

(*e*) See stats. 1 & 2 Vict. c. 110, s. 22; 18 & 19 Vict. c. 15, s. 8; 35 & 36 Vict. c. 86, schedule, s. 9; 51 & 52 Vict. c. 43, s. 151; Elphinstone and Clark on Searches, 53—56.

(*f*) By stat. 31 & 32 Vict. c.

54.

(*g*) By stat. 45 & 46 Vict. c. 81.

out of the rents and profits (*i*); and this was formerly his only remedy (*k*). A tenancy by *elegit* is a chattel real, passing to the executor or administrator, not the heir (*l*); and the tenant was expressly provided by statute with the freeholder's remedy for dispossession (*m*). The Act of 1838 enabled the creditor to take proceedings to realise his judgment, as a charge, in equity (*n*). And he is now provided with a more complete remedy by the Act of 1864 amending the law of judgments. Under this Act (*o*), every creditor, to whom any land of his debtor shall have been actually delivered in execution by virtue of any judgment, and whose writ shall have been duly registered (*p*), may obtain from the Chancery Division of the High Court, upon petition in a summary way, an order for the sale of his debtor's interest in such land. The other judgment creditors, if any, are to be served with notice of the order for sale; and the proceeds of the sale are to be distributed amongst the persons who may be found entitled thereto, according to their priorities (*q*). And every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, is bound by every such order for sale, and by all the proceedings consequent thereon (*r*).

Secondly, freeholders are subject to involuntary alienation for debt in the tenant's lifetime in the case of his bankruptcy. Bankruptcy is the name given to the judicial proceedings, first introduced by statutes of

(*i*) 2 Inst. 396; 2 Black. Comm. 161; 2 Wms. Saund. 72, note (6); Elphinstone and Clark on Searches, 67; Stat. 1 & 2 Vict. c. 110, s. 11.

(*k*) See *Neate v. Duke of Marlborough*, 3 My. & Cr. 407, 417.

(*l*) Co. Litt. 43 b; see *ante*, p. 25.

(*m*) Stat. 18 Edw. I. c. 18.

(*n*) *Ante*, p. 246.

(*o*) Stat. 27 & 28 Vict. c. 112, s. 4.

(*p*) See *ante*, pp. 249, 250.

(*q*) Sect. 5.

(*r*) Sect. 6.

Composition
or arrange-
ment.

Insolvency.

Henry VIII. and Elizabeth (*s*), by which a man may be released from his debts, after surrendering all his property to his creditors. By the Bankruptcy Act, 1883, when a debtor is adjudged bankrupt, the whole of his freehold, as well as his personal estate, vests in the trustee under the Act, who is empowered to sell the same and divide the proceeds amongst the creditors, who have proved their debts (*t*). And where a debtor is released from his debts by a composition or scheme of arrangement approved by the Court under the present bankruptcy law (*u*), all or any part of his property may by the terms of the composition or scheme be vested in the trustee appointed to carry out the same. Debtors frequently obtain a release from their debts by private arrangement with their creditors. But every assignment of property, or other deed or agreement of arrangement, made for the benefit of a man's creditors generally (otherwise than in pursuance of the bankruptcy law) is now void, unless duly registered in the Central Office under the Deeds of Arrangement Act, 1887 (*v*); and is void, as against a person becoming after the year 1888 a purchaser for value of any land or hereditaments comprised therein, unless also duly registered in the debtor's name in the Office of Land Registry under the Land Charges Act of 1888 (*x*). Both these registers are open to search (*y*). Before the Bankruptcy Act, 1861 (*z*), which first rendered non-traders, as well as traders, subject to the bankruptcy laws, a debtor might also be divested of his property on his insolvency, that

(*s*) Stats. 34 & 35 Hen. VIII. c. 4; 18 Eliz. c. 7; see Williams on Personal Property, 174, 18th ed.

(*t*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 54, 56, 58, 168; see Williams on Personal Property, 196, 197, 202, 208, 207, 212, 18th ed.

(*u*) Stat. 55 & 54 Vict. c. 71, s.

3, sub-ss. 16, 17.

(*v*) Stat. 50 & 51 Vict. c. 57, ss. 4—6.

(*x*) Stat. 51 & 52 Vict. c. 51, ss. 2, 4, 7—9.

(*y*) Stats. 50 & 51 Vict. c. 57, s. 12; 51 & 52 Vict. c. 51, ss. 16, 17.

(*z*) Stat. 24 & 25 Vict. c. 134, ss. 19—27, 69.

is, on his taking the benefit of the Acts for the relief of insolvent debtors (*a*); in which event his whole estate became vested in the assignee under the Acts for the benefit of his creditors (*b*).

Fee simple estates are also subject in the hands of the heir or devisee of a deceased tenant to debts of all kinds contracted by him in his lifetime. This liability, too, has been established by very slow degrees (*c*). It appears that, in the early periods of our history, the heir of a deceased person was bound, to the extent of the inheritance which descended to him, to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy (*d*). But the spirit of feudalism, which attained to such a height in the reign of Edward I., appears to have infringed on this ancient doctrine; for we find it laid down by Britton, who wrote in that reign, that no one should be held to pay the debt of his ancestor, whose heir he was, to any other person than the king, unless he were by the deed of his ancestor especially bound to do so (*e*). On this footing the law of England long continued. It allowed any person, by any deed or writing under seal (called a special contract or specialty) (*f*) to bind or charge his heirs, as well as himself, with the payment of any debt, or the fulfilment of any contract; in such a case the heir was liable, on the decease of his ances-

Alienation for debt after death.

Heirs might anciently be bound by specialty.

(*a*) Stats. 1 & 2 Vict. c. 110, ss. 23 *et seq.*, replacing 7 Geo. IV. c. 57, continued and amended by 11 Geo. IV. & 1 Will. IV. c. 88; 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102: all repealed by 24 & 25 Vict. c. 184, s. 280, and 32 & 33 Vict. c. 88, s. 20. See Williams on Personal Property, 286, 12th ed.; 241, 18th ed.

(*b*) See stats. 1 & 2 Vict. c. 110, ss. 37, 45; 5 & 6 Vict. c. 116, s. 7; 7 & 8 Vict. c. 96, ss.

4, 10; 10 & 11 Vict. c. 102, s. 5.

(*c*) See Co. Litt. 191 a, n. (1), vi. 9.

(*d*) Glanville, lib. vii. c. 8; Bract. 61 a; 1 Reeves's Hist. Eng. Law, 813. These authorities appear to be express; the contrary doctrine, however, with an account of the reasons for it, will be found in Bac. Abr. tit. Heir and Ancestor (F).

(*e*) Britt. 64 b; Fleta, fo. 135.

(*f*) See *ante*, pp. 144—146.

Assets.

tor, to pay the debt or fulfil the contract, to the value of the lands which had descended to him from the ancestor, but not further (*g*). The lands so descended were called *assets* by descent, from the French word *assez*, enough, because the heir was bound only so far as he had lands descended to him enough or sufficient to answer the debt or contract of his ancestor (*h*). If, however, the heir was not expressly named in such bond or contract, he was under no liability (*i*). When the power of testamentary alienation was granted, a debtor, who had thus bound his heirs, became enabled to defeat his creditor, by devising his estate by his will to some other person than his heir; and, in this case, neither heir nor devisee was under any liability to the creditor (*j*). Some debtors, however, impelled by a sense of justice to their creditors, left their lands to trustees in trust to sell them for the payment of their debts, or, which amounts to the same thing, charged their lands, by their wills, with the payment of their debts. The creditors then obtained payment by the bounty of their debtor; and the Court of Chancery, in distributing this bounty, thought that "equality was equity," and consequently allowed creditors by simple contract to participate equally with those who had obtained bonds binding the heirs of the deceased (*k*). In such a case the lands were called *equitable assets*. At length an Act of William and Mary made void all devises by will, as against creditors by specialty in which the heirs were bound, but not further or otherwise (*l*); but devises or dispositions of any lands or hereditaments for the payment of any real and just debt or debts

Equitable assets.

(*g*) Bac. Abr. tit. Heir and Ancestor (F); Co. Litt. 376 b.

(*h*) 2 Black. Comm. 344; Bac. Abr. tit. Heir and Ancestor (I).

(*i*) Dyer, 271 a, pl. 25; Plow. 457.

(*j*) Bac. Abr. *ubi sup*.

(*k*) *Parker v. Dea*, 2 Cha. Cas. 201; *Bailey v. Ebina*, 7 Ves. 319; 2 Jarm. Wills, 618, 4th ed.

(*l*) Stat. 8 Will. & Mary, c. 14, s. 2, made perpetual by stat. 6 & 7 Will. III. c. 14.

were exempted from the operation of the statute (*m*). Creditors, however, who had no specialty binding the heirs of their debtor, still remained without remedy against either heir or devisee; unless the debtor chose of his own accord to charge his lands by his will with the payment of his debts; in which case, as we have seen, all creditors were equally entitled to the benefit. So that, till the early part of the present century, a landowner might incur as many debts as he pleased, and yet leave behind him an unencumbered estate in fee simple, unless his creditors had taken proceedings in his lifetime, or he had entered into any bond or specialty binding his heirs. At length, in 1807, the fee simple estates of deceased *traders* were rendered liable to the payment, not only of debts in which their heirs were bound, but also of their simple contract debts (*n*), or debts arising from contracts made without any sealed writing (*o*). By a subsequent statute (*p*), the above enactments were consolidated and amended, and facilities were afforded for the sale of such estates of deceased persons as were liable by law, or by their own wills, to the payment of their debts. But notwithstanding the efforts of a Romilly were exerted to extend so just a liability, the lands of all deceased persons, not traders at the time of their death, continued exempt from their debts by simple contract, till the year 1833; when a provision, which, but a few years before, had been strenuously imposed, was passed without the least difficulty (*q*). All estates in fee simple, which the owner should not by his will have charged with, or devised subject to, the payment of his debts, were then rendered liable to be administered in the Court of Chancery, for the payment of all the just debts of the

Debts of
deceased
traders.

In 1833 lands
became
subject to
all debts.

(*m*) Stat. 3 Will. & Mary, c. 14, s. 4. (*p*) Stat. 11 Geo. IV. & 1 Will. IV. c. 47.

(*n*) By stat. 47 Geo. III. c. 74. (*q*) Stat. 3 & 4 Will. IV. c. 104.

(*o*) See Williams on Personal Property, 104, 18th ed.

Former effect
of a charge
of debts by
will.

All creditors
now stand in
equal degree.

Insolvent
estate of
deceased

deceased owner, as well debts due on simple contract as on specialty. But, out of respect to the ancient law, the Act provided that all creditors by special contract, in which the heirs were bound, should be paid the full amount of the debts due to them before any of the creditors by simple contract, or by specialty in which the heirs were not bound, should be paid any part of their demands. If, however, the debtor should by his last will have charged his lands with, or devised them subject to, the payment of his debts, such charge was still valid, and every creditor, of whatever kind, had an equal right to participate in the produce. Hence arose this curious result, that a person who had incurred debts, both by simple contract, and by specialty in which he had bound his heirs, might, by merely charging his lands with the payment of his debts, place all his creditors on a level, so far as they might have occasion to resort to such lands; thus depriving the creditors by specialty of that priority to which they would otherwise have been entitled (*r*). This anomaly was remedied in 1869 by an Act providing that, in the administration of the estate of every person who shall die on or after the 1st of January, 1870, no debt or liability of such person shall be entitled to any priority by reason merely that the same is secured by an instrument under seal or is otherwise made a specialty debt; but all his creditors, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of his assets, whether such assets are legal or equitable: provided that the Act shall not prejudice any lien, charge, or other security, to which any creditor may be entitled for the payment of his debt (*s*). Under the Bankruptcy Act, 1883 (*t*), the estate of a deceased

(*r*) See the Author's Essay on Real Assets.

(*s*) Stat. 32 & 33 Vict. c. 46.

(*t*) Stat. 46 & 47 Vict. c. 52, s.

125, amended by stat. 53 & 54 Vict. c. 71, s. 21; see *Re Baker*, 44 Ch. D. 262.

debtor, which is insufficient to pay all his debts in full, may, at the instance of a creditor or by order of any Court in which the estate is being administered, be administered in bankruptcy and distributed according to the law of bankruptcy. In bankruptcy, special and simple contract debts are, and always have been, on an equal footing as regards payment (*u*).

debtor may be administered in bankruptcy.

To secure the benefit of a testamentary charge of debts on real estate, or of the Act making real estate assets for the payment of debts, a creditor must take proceedings (*x*) under the equitable jurisdiction of the Court, now exercisable in the Chancery Division (*y*), for the administration by the court of his deceased debtor's estate; when a sale or mortgage of the real estate will be decreed, if necessary, to raise money to pay the debt (*z*). A creditor by special contract binding the heir has also the remedy, seldom exercised, of suing the heir or devisee for the debt (*a*). And any creditor may now take proceedings to have the insolvent estate of his deceased debtor administered in bankruptcy. When an order is made for the administration in bankruptcy of a deceased debtor's estate, his property (real as well as personal) vests in the official receiver of the Court as trustee thereof, who is then empowered to realise the same by sale or otherwise, and distribute the proceeds among the creditors of the deceased (*b*).

Creditor's remedies after debtor's death.

(*u*) See Williams on Personal Property, 214, 239, 18th ed.

(*x*) Formerly by suit, now by action or summons; Rules of the Supreme Court, 1883, Order LV., rr. 3—5.

(*y*) *Ante*, p. 158.

(*z*) See Seton on Decrees, 801, 805, 806, 814, 820, 843, 844, 857, 847, 4th ed.; *Spackman v. Tymbrill*, 8 Sim. 253; *Richardson v. Horton*, 7 Beav. 112; *Pimm*

v. Insell, 1 Mac. & G. 449; *British Mutual Investment Co. v. Smart*, L. R., 10 Ch. 567; *Price v. Price*, 85 Ch. D. 297.

(*a*) See stat. 11 Geo. IV. & 1 Will. IV. c. 47, ss. 2—8; *Shelford's Real Property Statutes*, pp. 463—470, 8th ed.; *Williams's Conveyancing Statutes*, 234, 235.

(*b*) Stat. 46 & 47 Vict. c. 52, s. 125.

Crown debts. The Crown is, by Royal prerogative and by Statute, invested with various special privileges for the recovery of the debts due to it, besides the ordinary creditor's remedies. Thus a Crown debtor's freeholds in fee simple, in the hands of himself, his heirs or devisees (*c*), may be seized, as well as his body (*d*) and goods, in satisfaction of any debt due to the Crown under process duly issued for the purpose (*e*). And debts due, or which might have become due, to the Crown, from persons who were accountants to the Crown (*f*), and debts of record (*g*), or by specialty (*h*) in form prescribed by statute (*i*), due from other persons to the Crown were formerly binding on their estates in fee simple when sold, as well as when devised by will, or suffered to descend to the heir at law (*k*). Simple contract debts (*l*),

(*c*) *R. v. The Estate of G. Hassell*, McClelland, 105.

(*d*) See *A.-G. v. Edmunds*, 22 L. T. N. S. 667; *Re Smith*, 2 Ex. D. 47.

(*e*) 3 Black. Comm. 420; Manning's Exchequer Practice, pt. i., bk. i., 2nd ed.; Chitty on the Prerogatives of the Crown, ch. xii.; stat. 28 & 29 Vict. c. 104, ss. 47, 51.

(*f*) Stats. 13 Eliz. c. 4; 25 Geo. III. c. 85; Co. Litt. 191 a, n. (1), vi. 9, 209 a, n. (1); Sug. V. & P. 544, 14th ed.

(*g*) These are debts appearing to be due by matter of record; that is, by the evidence of any court of record, properly a court, of which the proceedings are enrolled or recorded, and the records of which are indisputable evidence of its proceedings. Judgment debts and recognizances (see *ante*, p. 248) are debts of record; so are debts found to be due to the Crown by the verdict of an inquest of office held for the purpose. See *Glanv.* viii. 5-11; *Bract.* 156 b, 288 b, 289; *Britton*, liv. i. ch. 1, §§ 7-12, ch. 28, § 1; *Co. Litt.* 117 b, 260 a; *Black. Comm.* ii. 464; iii. 24; Manning's Exchequer

Practice, 1, 86 *et seq.*, 2nd ed.; Chitty on the Prerogatives of the Crown, 265-271, 293.

(*h*) *Ante*, p. 255.

(*i*) Stat. 33 Hen. VIII. c. 39, ss. 36, 37, 52 (ss. 50-56, 75 in Ruffhead); see Chitty, Prerogatives, 265, 293.

(*k*) By stats. 2 & 3 Vict. c. 11, s. 10, and 12 & 13 Vict. c. 89, any two of the commissioners of the Treasury were empowered to certify that any lands of any crown debtor or accountant should be held by the purchaser or mortgagee thereof discharged from all further claims of the Crown in respect of any debt or liability of the debtor or accountant to whom the lands belonged. And by stats. 16 & 17 Vict. c. 107, ss. 195-197; 23 & 24 Vict. c. 115, s. 1; and 39 & 40, Vict. c. 36, ss. 167, 288, a similar power was given to any two of the commissioners or principal officers, or the only commissioner or principal officer, of any public department with respect to any crown bond or other security concerning or incident to any such department.

(*l*) *Ante*, pp. 77, 78, 267.

Debts of record.

however, due to the Crown from a vendor of lands, who was no public accountant to the Crown, were not binding on the purchaser unless he had notice of them (*m*). But no liabilities to the Crown by record, specialty, or accountantship incurred after the 3rd of June, 1839, can affect any lands as to purchasers or mortgagees unless duly registered in the index of Crown debtors and accountants (*n*) and re-registered within the last five years (*o*). And by the Crown Suits Act of 1865 (*p*), no such liabilities to the Crown incurred after the 1st of November, 1865, shall affect any land as to a *bond fide* purchaser for valuable consideration or a mortgagee, whether he have or have not notice of the same, unless a writ or process of execution has been issued and registered in the Central Office of the Supreme Court (*q*) before the execution of the conveyance or mortgage, and the payment of the purchase or mortgage money. No other registration of the writ or process, or of the debt or liability (if incurred after the last-mentioned date), is now necessary for any purpose (*r*).

By a statute of the reign of Elizabeth, conveyances of landed estates, and also of goods, made for the purpose of delaying, hindering or defrauding creditors, are void as against them; unless made upon good, which here means *valuable*, consideration (*s*), and *bond fide*, to any person not having, at the time of the conveyance, any notice of such fraud (*t*). Such con-

Conveyances
for defraud-
ing creditors.

(*m*) *King v. Smith*, Wightw. 34; *Casberd v. A.-G.*, 6 Price, 411, 473—476.

(*n*) Stat. 2 & 3 Vict. c. 11, s. 8. This register was originally in the office of the Court of Common Pleas, but is now in the Central office of the Supreme Court; see Williams's Conveyancing Statutes, 264, 268.

(*o*) Stat. 22 & 23 Vict. c. 35, s. 22.

(*p*) Stat. 28 & 29 Vict. c. 104,

ss. 4, 48, 49.

(*q*) Originally in the office of the Court of Common Pleas; see Williams's Conveyancing Statutes, 267, 268.

(*r*) Sect. 49.

(*s*) *Ante*, p. 74.

(*t*) Stat. 13 Eliz. c. 5; *Twyne's case*, 3 Rep. 81 a; 1 Smith's Leading Cases, 1; *Spencer v. Slater*, 4 Q. B. D. 13; *Re Johnson, Golden v. Gillam*, 20 Ch. D. 339;

veyances of land are, therefore, of no avail against the claim of a creditor to take the land in execution, or against the title of the debtor's trustee in bankruptcy, or against creditors who take proceedings to secure payment of their debts out of the debtor's estate after his death (*u*). Fraudulent conveyances of property are also void, as against the trustee in bankruptcy of the conveying party, under the bankruptcy laws (*x*). And by the Bankruptcy Act, 1883 (*y*), any voluntary settlement of property (*z*) shall, if the settlor becomes bankrupt within two years after the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the settlement, be void as against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof (*a*).

Alienation of
estate tail for
debt.

With regard to the alienation of an estate tail for debt, under the old law of judgments (*b*), lands held for an estate tail could not be seized under a writ of *elegit* for a longer time than the life of the tenant in tail, against whom judgment for debt or damages had been recovered (*c*). But by the Act of 1838, extending

Halifax Joint Stock Banking Co. v. Gledhill, 1891, 1 Ch. 81.

(*u*) *Richardson v. Smallwood*, Jac. 552.

(*x*) See Principles of the Law of Personal Property, 178, 182, 18th ed.; 1 Smith's Leading Cases, 26—29, 9th ed.

(*y*) Stat. 46 & 47 Vict. c. 52, s. 47, replacing 32 & 33 Vict. c. 71, s. 91, avoiding similar settlements by traders.

(*z*) Including any conveyance

or transfer of property, but excepting settlements on the settlor's wife or children of property accrued to him after marriage in right of his wife.

(*a*) *Ex parte Huxtable*, *Re Coni-beer*, 2 Ch. D. 54; *ex parte Hillman*, *Re Pumfrey*, 10 Ch. D. 622; *ex parte Russell*, *Re Butterworth*, 19 Ch. D. 588; *Re Briggs and Spicer*, 1891, 2 Ch. 127.

(*b*) *Ante*, pp. 244—246.

(*c*) *Anderson's case*, 7 Rep. 21.

creditors' remedies, judgment debts (*d*) were made ^{Judgment debts.} binding on the lands of the debtor, as against the issue of his body, and also as against all other persons whom he might, without the assent of any other person, cut off and debar from any remainder or reversion (*e*). As we have seen, no judgment entered up on or after the 29th of July, 1864, can affect any land, until the land has been actually delivered in execution; and actual delivery in execution is void, as against purchasers, unless the writ be duly registered (*f*). An estate tail ^{Bankruptcy of tenant in tail.} may also be barred and disposed of on the bankruptcy of a tenant in tail, for the benefit of his creditors, to the same extent as he might have barred or disposed of it for his own benefit (*g*). But if a tenant in tail die before any judgment against him has affected his lands, and without having been adjudged bankrupt (*h*), the entailed lands will no longer be subject to his debts, except certain Crown debts (*i*). For, by a Statute of Henry VIII. (*k*), estates tail are charged, in the hands of the heir, with debts due from his ancestor to the Crown by judgment, recognizance, obligation or other specialty (*l*), although the heir shall not be comprised therein. And all arrears and debts due to the Crown, by accountants to the Crown, whose yearly or total receipts exceed three hundred pounds, were, by a Statute of Elizabeth (*m*), placed on the same footing.

A life estate is liable during the tenant's life to be ^{Involuntary alienation of life estate.} taken to satisfy any judgment debt of his, in the same

(*d*) See *ante*, p. 247.

(*e*) Stat. 1 & 2 Vict. c. 110, s. 13. See *Lewis v. Duncombe*, 20 Beav. 398; Sug. V. & P. 528, 14th ed.

(*f*) *Ante*, pp. 248—250.

(*g*) Stats. 3 & 4 Will. IV. c. 74, ss. 56—73; 46 & 47 Vict. c. 52, s. 56, sub-s. 5.

(*h*) See stat. 3 & 4 Will. IV. c.

74, s. 65.

(*i*) 1 Rolle Abr. 841 (F); 7 Rep. 21.

(*k*) 83 Hen. VIII. c. 89, s. 52 (s. 75 in Ruffhead); Chitty on the Prerogative of the Crown, 299.

(*l*) *Ante*, pp. 248, 255.

(*m*) Stat. 13 Eliz. c. 4; and see 25 Geo. III. c. 85; Chitty, Prerogative, 294, 295.

Estates *pur autre vie*.

manner as an estate in fee simple (*n*). And it is similarly liable to vest in the creditors' trustee on his bankruptcy (*o*). But it is not in any way subject to the tenant's debts after his death. Determinable life estates are not subject to the tenant's debts after their determination (*p*). Estates *pur autre vie* are liable to alienation for debt in the tenant's lifetime in the same manner as other freehold estates (*q*); and after his death, they continue liable to his debts during the remainder of the life of the *cestui que vie* (*r*).

Judgment creditor's rights against trust estates.

Judgment creditors have the following rights against their debtors' equitable or trust estates:—(1) They may by statute take lands and hereditaments held on a simple trust (*s*) for the debtor under the writ of *elegit*. This remedy was first given by the Statute of Frauds (*t*), and was enlarged by the Act of 1838 extending creditors' remedies. By this Act, execution may be delivered under the writ of *elegit* of all such lands and heredita-

(*n*) *Ante*, pp. 244—250.

(*o*) *Ante*, p. 254.

(*p*) See *ante*, pp. 78, 79, 123, 124.

(*q*) *Ante*, pp. 244—254.

(*r*) *Ante*, p. 127.

(*s*) *Ante*, p. 170.

(*t*) Stat. 29 Car. II. c. 3, s. 10, which empowered the sheriff to deliver execution unto the judgment creditor of all such lands and hereditaments as any other person or persons should be seised or possessed of *in trust for* the judgment debtor, like as the sheriff might have done if the judgment debtor had been seised of such lands or hereditaments of such estate as they be seised of in trust for him *at the time of execution sued*. This enactment was evidently copied from a similar provision made by stat. 19 Hen. VII. c. 15, respecting lands of which others were seised to the use of a judgment debtor; which statute of course became inoperative when uses were, by the Statute of Uses, turned into estates at law. The construction placed upon this enactment of the Statute of Frauds was more favourable to purchasers than that placed on stat. 18 Edw. I. c. 18, *ante*, p. 244. For it was held that although the trustee might have been seised in trust for the debtor at the time of obtaining the judgment, yet if he had conveyed away the lands to a purchaser before execution was actually sued out on the judgment, the lands could not afterwards be taken; because the trustee was not, in the words of the statute, seised in trust for the debtor *at the time of execution sued*; *Hunt v. Coles*, Com. 226; *Harris v. Pugh*, 4 Bing. 335; 12 J. B. Moore, 577. But stat. 1 & 2 Vict. c. 110, deprived purchasers of this advantage.

ments as the person against whom execution is sued, or any person in trust for him, shall have been seised or possessed at the time of entering up the judgment or at any time afterwards (u). (2) Judgment creditors may obtain what is called *equitable execution*. This originated in the relief which the Court of Chancery used to give to a judgment creditor, who had sued out a writ of *elegit* to take the debtor's land at law, but was prevented from executing it by the fact that the legal estate was outstanding in some other, who was not trustee for the debtor simply (x). In such cases, the creditor might have obtained the appointment by the Court of a receiver of the rents and profits of the debtor's equitable estate in the land (y). The jurisdiction of the present High Court of Justice (z) to appoint a receiver was enlarged by the Judicature Acts (a). And now it appears that a judgment creditor may obtain equitable execution by means of an order for the appointment of a receiver of the profits of his debtor's interest in land, whenever there are circumstances to hinder the convenient operation of his legal remedy by *elegit* (b); and there is no necessity for him to sue out an *elegit* in the first instance (c).

As judgments were enforceable in equity under the old law, they were regarded as charges in equity upon equitable estates in land, and therefore binding upon all who succeeded to the judgment debtor's estate, except those who took it as purchasers for value without notice

How far judgments are charges upon equitable estates.

(u) Stat. 1 & 2 Vict. c. 110, s. 11.

(z) *Neale v. Duke of Marlborough*, 8 My. & Cr. 407; *Mitford on Pleading*, 126 (148, 5th ed.); *Lewin on Trusts*, 797 *et seq.*, 8th ed.

(y) 19 Ves. 688; 2 Swanst. 187, 155; *Daniell*, Ch. Fr. 1568, 1564, 5th ed.

(s) *Ante*, p. 157.

(a) Stat. 86 & 87 Vict. c. 66, s. 25, sub-s. 8.

(b) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Smith v. Cowell*, 6 Q. B. D. 75; *Salt v. Cooper*, 16 Ch. D. 544; *Re Pops*, 17 Q. B. D. 748; *Re Shephard*, 43 Ch. D. 181; *Levasseur v. Mason*, & *Barry*, 1891, 2 Q. B. 78.

(c) *Ex parte Evans*, *Re Watkins*, 18 Ch. D. 252.

of the judgment (*d*). The Act of 1838 for extending creditors' remedies expressly made judgments a charge on all hereditaments to which the judgment debtor should at the time of entering up judgment, or at any time afterwards, be entitled for any estate or interest whatever at law or in equity (*f*). But, as we have seen, under this Act purchasers were not to be affected by judgments, unless duly registered (*g*). The Acts of 1839 and 1860, before referred to (*h*), further protected purchasers of equitable as well as legal estates (*i*). And now, under the Act of 1864, no subsequent judgment shall affect any land, until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority (*k*). It is held under this Act that an equitable interest in land is actually delivered in execution, when the judgment creditor has obtained an order for the appointment of a receiver; and he has no charge until then (*l*). As we have seen, since 1838, it has been further requisite to register the writ or order enforcing a judgment in the office of Land Registry; or else it will be void as against purchasers for value (*m*).

Bankruptcy of
cestui que
trust.

— of trustee.

Equitable estates are liable to involuntary alienation on the bankruptcy of the person entitled thereto, in the same manner as his estates at law (*n*). But on the bankruptcy of a trustee, the legal estate in any property, of which he is trustee for any other person, does not pass to the trustee for his creditors, but remains vested in him (*o*).

(*d*) Sug. V. & P. 518, 14th ed.; Lewin on Trusts, 797—808, 8th ed.; *ante*, p. 170.

(*f*) Stat. 1 & 2 Vict. c. 110, s. 18; *ante*, p. 246.

(*g*) Sect. 19; *ante*, p. 246.

(*h*) *Ante*, pp. 247, 248.

(*i*) Sug. V. & P. 535, 14th ed.

(*k*) *Ante*, p. 249.

(*l*) *Batton v. Haywood*, L. R.,

9 Ch. 229; and cases cited in notes (*b*) (*d*) to p. 265, *ante*.

(*m*) *Ante*, pp. 249, 250.

(*n*) *Ante*, p. 254.

(*o*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 168. The same rule was formerly applied to cases of insolvency; *Sims v. Thomas*, 12 A. & E. 536.

Trust estates in fee simple are also liable, like estates at law, to alienation for the payment of the owner's debts after his death. By the Statute of Frauds it was provided, that if any *cestui que trust* should die, leaving a trust in fee simple to descend to his heir, such trust should be assets by descent, and the heir should be chargeable with the obligation of his ancestors for and by reason of such assets, as fully as he might have been if the estate in law had descended to him in possession in like manner as the trust descended (*p*). And the subsequent statutes to which we have before referred, for preventing the debtor from defeating his bond creditor by his will, and for rendering the estates of all persons liable on their decease to the payment of their just debts of every kind, apply as well to equitable or trust estates as to estates at law (*q*).

Trust estates are subject to debts due to the Crown in the same manner and to the same extent as estates at law (*r*). And in the case of equitable estates tail and for life, the liability for the owner's debts is similar to that attached to the like estates at law (*s*).

In connection with creditors' rights against purchasers of land, it may be mentioned that actions at law or in equity respecting lands will bind a purchaser, as well as the tenant's heir or devisee; that is, he must abide by the result, although he may be ignorant that any such proceedings are depending (*t*). A provision has accordingly

(*p*) Stat. 29 Car. II. c. 3, s. 10. Before this provision the Court of Chancery had refused to give the bond creditor any relief. *Bennet v. Box*, 1 Ch. Ca. 12; *Pratt v. Colt*, *ib.* 128. These decisions, in all probability, gave rise to the above enactment. See 1 Wm. Black. 159; 1 Sand. Uses, 276 (289, 5th ed.).

(*q*) Stats. 3 Will. & Mary. c. 14, s. 2; 47 Geo. III. c. 74; 11 Geo. IV. & 1 Will. IV. c. 47;

3 & 4 Will. IV. c. 104; 32 & 33 Vict. c. 46; 46 & 47 Vict. c. 52, s. 125; *ante*, pp. 256—258.

(*r*) *The King v. Smith*, Sug. V. & P., Appx. No. 15, p. 1098, 11th ed.; Chitty on the Prerogative of the Crown, 296.

(*s*) Sug. V. & P. 524, 538, 14th ed.

(*t*) Co. Litt. 344 b; *Anon.*, 1 Vern. 818; *Hiern v. Mill*, 13 Ves. 120; 8 Prest. Abst. 354; *Bellamy v. Sabine*, 1 De G. & J., 566

been made for the registration of every *lis pendens*; and no *lis pendens* binds a purchaser or mortgagee without express notice thereof, unless and until it is duly registered; and the registration to be binding must be repeated every five years (*u*). This registration is now made in the Central Office of the Supreme Court (*x*).

Searches.

In consequence of the above-mentioned laws, it is the practice to cause a search to be made, before every purchase or mortgage of freeholds, in the registers of judgments, writs and orders affecting land, and pending actions, and also of Crown debts and writs of execution, if there be reason to suppose that the owner of the property has been a Crown debtor or accountant (*y*).

Official searches.

And if the search disclose any registered incumbrance affecting the land, it must be got rid of, before the sale or mortgage can be safely completed. By the Conveyancing Act, 1882 (*z*), provision is made for official searches in the Central Office of the Supreme Court, at the instance of purchasers and others, for entries of judgments, writs of execution, *lis pendens* and other matters, whereof entries are required or allowed to be made in that

Certificate.

office by any statute (*a*); and for making a certificate of the result of any such search. And it is enacted (*b*),

(*u*) Stat. 2 & 3 Vict. c. 11, s. 7; see *Price v. Price*, 35 Ch. D. 297; stat. 51 & 52 Vict. c. 51, ss. 5, 6.

(*x*) See Williams's Conveyancing Statutes, 264, 268. By stat. 50 & 51 Vict. c. 47, s. 2, the Court before whom the property sought to be bound is in litigation is empowered, on the determination of the *lis pendens*, or during its pendency if satisfied that the litigation is not prosecuted *bona fide*, to order the registration to be vacated without the consent of the party by whom the *lis pendens* was registered.

(*y*) *Ante*, pp. 246–250, 261,

267. See Sug. V. & P. 537, 538, 543, 14th ed.; 1 Dart. V. & P. 523, 524, 557, 562, 564, 6th ed.; Elphinstone & Clark on Searches, 50, 58, 93, 147, *et seq.*, and Appendix on Land Charges Act of 1888, pp. 17, 18.

(*z*) Stat. 45 & 46 Vict. c. 39, s. 2; and rule thereunder; Williams's Conveyancing Statutes, 262–274, 479–488.

(*a*) Williams's Conveyancing Statutes, 268–270.

(*b*) Stat. 45 & 46 Vict. c. 39, s. 2, sub-s. 3; as to the effect of which see Elphinstone & Clark on Searches, 166–168.

Registration
may be
vacated.

that, in favour of a purchaser (c), as against persons interested under or in respect of judgments or other matters, whereof entries are required or allowed to be made as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be. These provisions now apply to the registers established by the Land Charges Act of 1888 (d).

(c) In this Act purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes

or deals with property; sect. 1, sub-s. 4 (ii).

(d) Stat. 51 & 52 Vict. c. 51, s. 17; *ante*, pp. 121, 249, 250.

CHAPTER XII.

OF PERSONAL CAPACITY.

It has been mentioned (*a*) that a tenant of lands may be prevented by personal incapacity from exercising the right of alienation, which is now regarded as inherent in ownership (*b*). Let us now consider what persons have the legal capacity to purchase, hold and dispose of an estate in land; the word *purchase* being here used in its legal meaning (*c*), which includes the acquisition of land under a will or a voluntary conveyance, as well as on a sale. It should be noted that capacity so to *purchase* lands merely indicates that a conveyance of land to the person capable will give him the legal estate therein: it does not include capacity to *buy* land, in the common sense of the word. That is a matter depending on capacity to contract. It will therefore be useful to inquire as well, what persons may contract with regard to land.

Persons
natural and
artificial.

Persons are either natural—men, women and children—or artificial, as corporations. All natural persons, including infants, lunatics, married women, convicts and, at the present day (*d*), aliens, are capable of purchasing and holding lands. And, as a general rule, any natural person may dispose freely of the land he holds (*e*), and may contract with regard to land. To

(*a*) *Ante*, p. 72.

(*b*) *Ante*, pp. 7, 78, 141.

(*c*) *Ante*, pp. 65, 203.

(*d*) By stat. 38 Vict. c. 14, s. 2.

(*e*) Co. Litt. 2, 3, 42 b; *ante*, pp. 69, 70, 85, 101, 112.

this rule there are exceptions in the case of infants, persons of unsound mind, drunken persons, married women, and convicts. Corporations may purchase lands (*f*): but their capacity for holding or disposing of them is restricted by laws, which have no application to natural persons.

All persons under the age of twenty-one years are *Infants*. infants in law (*g*). The purchase of land by an infant is voidable at his option; that is, he may disagree thereto within a reasonable time after coming of age, and so may his heir, if he die while the purchase is still voidable: but it remains good until set aside (*h*). And the conveyance of land by an infant is, as a rule, similarly voidable (*i*). But, as we have seen, an infant under the custom of gavelkind may make a valid conveyance by feoffment (*k*). And by an Act of 1855 (*l*), every infant not under twenty if a male, and not under seventeen if a female, is empowered to make, in contemplation of marriage, a valid and binding settlement of any property, whether real or personal, with the sanction of the Chancery Division of the High Court. There are also other cases in which infants are specially empowered by statute to convey land, though for the benefit of others rather than of themselves (*m*). An infant's capacity to contract with regard to land is determined by the general rule of common law that infants' contracts are voidable at their option (*n*).

(*f*) Co. Litt. 2 b.

(*g*) Litt. s. 259; Co. Litt. 2 b, 78 b, 171 b.

(*h*) Co. Litt. 2 b; *Birkenhead, &c. Railway Co. v. Filcher*, 5 Ex. 128—128; 1 Dart. V. & P. 29, 80, 6th ed.

(*i*) 2 Black. Comm. 291; Bac. Abr. Infancy and Age (I. 8); *Zouch v. Parsons*, 8 Burr. 1794; *Allen v. Allen*, 2 Dru. & War. 807, 338, 346.

(*k*) *Ante*, pp. 55, 199.

(*l*) Stat. 18 & 19 Vict. c. 48, extended to the Court of Chancery in Ireland by stat. 23 & 24 Vict. c. 88; *Re Dalton*, 6 De G. M. & G. 201.

(*m*) See 1 Dart. V. & P. 3, 347, n. (*k*), 6th ed.; stat. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 16, 81.

(*n*) See Pollock on Contracts, ch. ii., pp. 52 *et seq.*, 5th ed.

Infants'
guardians.

During an infant's minority his guardian in socage (*o*) or by statute is entitled to the custody of his estate, to be used for his benefit (*p*). Guardians by statute are so called because their authority was established by the Statute of Charles II. abolishing military tenures (*q*). For when this Act took away the right of wardship of infant tenants from the lords (*r*), it gave to the father the right of appointing guardians, by deed or will, to any child of his, who should be under age and unmarried at his death (*s*). The guardian so appointed has the custody and tuition of the child, while remaining under the age of twenty-one years, or for any shorter time appointed; he also has a right to receive the rents of the child's lands for the use of the child, to whom, like a guardian in socage, he is accountable when the child comes of age (*t*). And now, by the Guardianship of Infants Act, 1886 (*u*), on the death of the father of an infant, the mother shall be the guardian, either alone or jointly with any guardian appointed by the father or the Court. The mother of an infant is, by the same Act, empowered (*x*) by deed or will to appoint guardians to act after her own and the father's death; and where

(*o*) *Ante*, p. 48.

(*p*) *Bac. Abr. Guardian* (A). As to the duties and powers of guardians, see *Simpson on Infants*.

(*q*) *Ante*, p. 51.

(*r*) *Ante*, pp. 45, 51.

(*s*) Stat. 12 Car. II. c. 24, s. 8; see *Morgan v. Hatchell*, 19 Beav. 86. This power was given whether the father were under or over the age of twenty-one. But it seems that the father, if under age, cannot now appoint a guardian by will; for the Wills Act enacts that no will made by any person under the age of twenty-one years shall be valid; stat. 7 Will. IV. & 1 Vict. c. 26, s. 7; 1 *Jarm. Wills*, 44, 4th ed.

(*t*) Stat. 12 Car. II. c. 24, ss. 8, 9; *Mathew v. Brise*, 14 Beav. 341. If an infant be entitled to

the possession of land under an instrument coming into operation after the year 1881, the Conveyancing Act, 1881, stat. 44 & 45 Vict. c. 41, s. 42, gives powers of entry upon and management of the infant's land during minority to the trustees appointed for this purpose in such instrument, or by the Court on the application of the infant's guardian or next friend; see *Williams's Conveyancing Statutes*, 203—210.

(*u*) Stat. 49 & 50 Vict. c. 27, s. 1.

(*x*) Sect. 3. A guardian could not previously be appointed by any one but the father; *Ex parte Edwards*, 8 Atk. 519; *Bac. Abr. Guardian* (A) 8. See also *Hargrave's notes to Co. Litt.* 88 b.

guardians are appointed by both parents they shall act jointly. Every guardian under this Act has the same powers over the estate and person of an infant as any guardian appointed under Statute 12 Car. II. c. 24 (y). Where not ousted by the effect of these enactments, the old law of wardship in socage still remains (z). Under the general jurisdiction of the Court of Chancery (a), now exercisable in the Chancery Division of the High Court (b), guardians both of the person and of the estate of an infant may be appointed by the Court, and the action of testamentary and other guardians controlled (c). By the Settled Land Act, 1882 (d), the powers of leasing and sale and the other powers given to a tenant for life by that Act may be exercised on behalf of an infant, in respect of any land, to which he is in his own right entitled in possession, by the trustees of the settlement, if any, or such other person as the Court may order.

As to the capacity of persons of unsound mind and drunken persons, the present law is this:—The contract of a man who is so insane or drunk as to be incapable of understanding its effect, is voidable at his option, if the other party knew of his condition. But if the other contracted with him in good faith, and without knowledge of or reasonable cause to suspect his state of mind, and the contract be partly executed, he cannot avoid it (e). The voluntary conveyance of land

Persons of
unsound mind
and drunken
persons.

(y) Sect. 4; *Re Scanlan*, 40 Ch. D. 200.

(z) 2 Black. Comm. 87; Chambers on Infancy, 52—68, 509—514; Simpson on Infants, 208, 2nd ed.

(a) See Co. Litt. 88 b, n. (15); 2 Fonblanque on Equity, 226, note; 1 Spence, Equitable Jurisdiction, Ch. XIV.

(b) Stat. 86 & 87 Vict. c. 66, ss. 16, 84; *ante*, p. 158.

W.R.P.

(c) See notes to *Eyre v. Countess of Shaftesbury*, 2 Tudor L. C. Eq. 718, 6th ed.; 2 Seton on Decrees, 718—725, 4th ed.; Dan. Ch. Practice, 1118—1122, 6th ed.

(d) Stat. 45 & 46 Vict. c. 38, ss. 59, 60; see also stat. 44 & 45 Vict. c. 41, s. 41; Williams's Conveyancing Statutes, 200.

(e) *Molton v. Camroux*, 2 Ex. 487, 4 Ex. 17; *Beavan v. McDonnell*, 9 Ex. 809; *Matthews v.*

by a person of unsound mind appears to be absolutely void (*f*). But a conveyance made by a person of unsound mind for a valuable consideration appears to be voidable only on his part, if the other party knew of his mental condition; and to be valid, if the transaction were carried out by the other party in good faith and without knowledge of the insanity (*g*). The law appears to be the same of a drunken person's conveyance of land for value: but it is questionable whether a voluntary conveyance made by a drunken man is void; for it seems that he might confirm it when sober (*h*). With regard to idiots and lunatics, the fullest powers of directing the management and administration of their property are by the Lunacy Act, 1890 (*i*), given to the Judge in Lunacy; and the *committees* of their estates, who are the persons to whom the care of their estates is committed, or such other persons as the judge shall approve, are empowered to execute and do all such assurances and things as may be directed in order to give effect to such powers (*k*). If a lunatic make a voidable contract or conveyance, it may be set aside by his committee, or by himself, if he should recover his senses, or if not, by his representatives after his death (*m*).

Committees.

Married
women.

Married women are now capable of disposing of any

Baxter, L. R., 8 Ex. 182; Pollock on Contracts, Ch. II. 87—94, 4th & 5th ed.

(*f*) *Elliot v. Ince*, 7 De G. M. & G. 475; Sug. Pow. 604, 8th ed. But before 1845, a feoffment with livery of seisin made by a lunatic was not void, but voidable; Bac. Abr. Idiots and Lunatics (F.); stat. 8 & 9 Vict. c. 106, s. 4; *ante*, p. 142.

(*g*) *Price v. Berrington*, 8 Mac. & G. 486, 495—498; *Elliot v. Ince*, 7 De G. M. & G. 475, 487, 488; Sug. Pow. 605, 8th ed.

(*h*) See *Molton v. Camroux*, 4 Ex. 17, 19; *Matthews v. Baxter*, L. R., 8 Ex. 182.

(*i*) Stat. 53 Vict. c. 5, ss. 108, 116, *et seq.* These matters were previously regulated by stat. 16 & 17 Vict. c. 70, s. 108 *et seq.*, amended by stat. 18 & 19 Vict. c. 18; & 25 & 26 Vict. c. 86; and before that by stat. 11 Geo. IV. & 1 Will. IV. c. 65.

(*k*) Stat. 53 Vict. c. 5, s. 124.

(*m*) See 2 Black. Comm. 291; 1 Dart, V. & P. 6, 31, 32, 6th ed.

real or personal property, which is their separate property, in the same manner as single women: except that they may be subject in equity to a restraint on alienation during marriage (*n*). But wives married before the year 1883 cannot so dispose of any property, to which their title accrued before that year (*o*); such property can only be disposed of by them in accordance with the earlier law, which will be explained in the next chapter. Married women may now bind themselves by contract in respect and to the extent of their separate property, to which they are entitled without restraint on anticipation: but not otherwise (*p*). At common law, their contracts were, as a rule, void (*q*).

By the Act of 1870 abolishing attainder (*r*), convicts, Convicts.
or persons against whom judgment of death or penal servitude has since the Act been pronounced or recorded for treason or felony, are incapable, while subject to the operation of the Act, of alienating or charging any property, or of making any contract. And an administrator of any convict's property may be appointed, in whom all his real and personal property shall vest, to re-vest in the convict or his representatives, on his death, bankruptcy, completion of his term of punishment, or pardon (*s*). But these disabilities on the part of a convict are suspended while he is lawfully at large under any licence (*t*). Before the abolition of attainder Attainted persons.
for treason or felony, persons attainted for these crimes could not, by any conveyance which they might make, defeat the right to their estates, which their attainer

(*n*) Stat. 45 & 46 Vict. c. 75, ss. 1 (sub-s. 1), 19; *Re Price*, 28 Ch. D. 709; *Re Drummond & Davies' Contract*, 1891, 1 Ch. 524; see *ante*, p. 79, and next chapter.

(*o*) See sect. 5; *Reid v. Reid*, 31 Ch. D. 402; *Re Ouno*, 43 Ch. D. 12.

(*p*) Stat. 45 & 46 Vict. c. 75,

s. 1, sub-s. 2; *Pulliser v. Gurney*, 19 Q. B. D. 519; *Scott v. Morley*, 20 Q. B. D. 120; *Polton v. Harrison*, 1891, 2 Q. B. 422.

(*q*) See Williams's Conveyancing Statutes, 298—296.

(*r*) Stat. 33 & 34 Vict. c. 23, ss. 6, 8; *ante*, p. 52.

(*s*) Sects. 7, 9, 10, 18.

(*t*) Sect. 30.

gave to the Crown, or to the lord, of whom their estates were holden (u).

Aliens.

By the common law, *aliens*, or foreigners under no allegiance to the Crown (x), might *purchase* but were incapable of inheriting or holding any estate in lands. And the conveyance of lands to an alien was in general (y) a cause of forfeiture to the Crown, which might seize the lands by virtue of its prerogative (z).

(u) Co. Litt. 42 b; 2 Black. Comm. 290; Perkins, tit. Grant, sect. 26; Com. Dig. Capacity (D.) 6; 2 Shep. Touch. 232; *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 785.

(x) Litt. s. 198. No person is considered an alien who is born within the dominions of the Crown, even though such person may be the child of an alien, unless such alien should be the subject of a hostile prince; 1 Black. Comm. 373; Bac. Abr. Aliens (A). And a person born in Scotland after the accession of James I. to the Crown of England, was held to be a natural-born subject, and consequently entitled to hold lands in England, although the two kingdoms had not then been united; *Calvin's case*, 7 Rep. 1; see *Re Stepney Election Petition*, 17 Q. B. D. 54. Again, the children of the Queen's ambassadors are natural-born subjects by the common law; 7 Rep. 18 a. And by several Acts of Parliament, the privileges of natural-born subjects were accorded to the lawful children, though born abroad, of a natural-born father, and also to the grandchildren on the father's side of a natural-born subject; stats. 25 Edw. III. st. 2; 7 Anne, c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21; *Doe d. Duroure v. Jones*, 4 T. R. 800; *Shedden v. Patrick*, 1 Macqueen's H. L. C. 535; *Fitch v. Weber*, 6 Hare, 51; *Re Willoughby*, 30 Ch. D. 324; see *De Geer v. Stone*, 22 Ch. D. 243. More recently, the children of a natural-born mother, though born abroad, were rendered capable of taking any real or personal estate; and it was provided that any woman, who should be married to a natural-born subject or person naturalized, should be taken to be herself naturalized, and have all the rights and privileges of a natural-born subject; stat. 7 & 8 Vict. c. 66, ss. 3, 16. Any foreigner might be made a denizen by royal letters patent, and capable as such of holding but not of inheriting lands, or might be naturalized by Act of Parliament; Co. Litt. 2 b, 129 a; 1 Black. Comm. 373. The law relating to aliens was generally amended by the Naturalization Act, 1870, stat. 33 Vict. c. 14, by which many of the former statutes on this subject were repealed.

Denizen.

(y) The common law allowed an exception in the case of a house occupied under a lease for years by a friendly alien merchant; Co. Litt. 2 b. And by Stat. 7 & 8 Vict. c. 66, s. 5, a resident alien, the subject of a friendly state, might hold lands for any term not exceeding twenty-one years for the purposes of residence or business.

(z) But not, at common law,

until after office found; that is, after an inquest of office, or official inquisition held to ascertain the facts of the case, had found a verdict; Co. Litt. 2 b, 42 b; Black. Comm. i. 371, 372; ii. 249, 274, 293; iii. 258. Conveyance of the lands by the alien to a natural-born subject before office found would not avail to defeat the liability to forfeiture, though in

And if lands were purchased by a natural-born subject in trust for an alien, the Crown might claim the benefit of the purchase (*a*). But now by the Naturalization Act, 1870 (*b*), real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien (*c*) in the same manner in all respects as through, from or in succession to a natural-born British subject.

Corporations, as conceived by the common law, were under no incapacity to hold or dispose of lands. A corporation, it may be explained, is a fictitious body invested by law with the attributes of a person, having a corporate name by which it can sue and be sued and hold property, but enjoying immortal existence by reason of the perpetual succession of its members (*d*); as the Corporation of London, or Trinity College, Cambridge. But by the effect of the statutes prohibiting the alienation of lands into mortmain (*e*), corporations are generally disabled from holding lands

other respects it was valid; *Shep. Touch.* 282; 4 *Leon.* 84; *Fish v. Klein*, 2 *Mer.* 431. Stat. 22 & 23 *Vict.* c. 21, s. 25, abolished the necessity of an inquest of office.

(*a*) *Barrow v. Wadkin*, 24 *Beav.* 1; *Sharp v. St. Sauveur*, *L. R.*, 7 *Ch.* 348; overruling *Ritton v. Stordy*, 8 *Sm. & G.* 230. But if lands were directed to be sold, and the produce given to an alien, the Crown had then no claim; *Du Hourmelin v. Sheldon*, 1 *Beav.* 79, 4 *My. & Cr.* 525.

(*b*) Stat. 38 *Vict.* c. 14, s. 2, passed 12th May, 1870, and amended by stats. 33 & 34 *Vict.* c. 102, and 35 & 36 *Vict.* c. 89. This Act is not retrospective;

Sharp v. St. Sauveur, *L. R.*, 7 *Ch.* 343.

(*c*) All the King's natural-born subjects were enabled to trace their title by descent through their alien ancestors by stat. 11 & 12 *Will.* III. c. 6, explained by 25 *Geo.* II. c. 89.

(*d*) 10 *Rep.* 80 b; 1 *Black. Comm.* 467, 475; *Mayor & Commonalty of Colchester v. Lowten*, 1 *V. & B.* 228, 244—246. *Blackburn, J., Riche v. Ashbury Railway Carriage Co.*, *L. R.*, 9 *Ex.* 224, 268; see *Grant on Corporations*, 129.

(*e*) Stat. 7 *Edw.* I. st. 2; 7 & 8 *Will.* III. c. 87; now repealed and replaced by stat. 51 & 52 *Vict.* c. 42, s. 1; *ante*, pp. 50, 72.

without a licence from the Crown to hold lands in mortmain, or the authority of an Act of Parliament (*f*). The corporations, which are empowered by statute to hold land without a licence in mortmain, are too numerous to be particularly specified here (*g*). For example, every joint stock company incorporated under the Companies Act, 1862 (*h*), has power to hold lands: but no company formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company or the members thereof, may hold more than two acres of land without the sanction of the Board of Trade (*i*).

Alienation of corporation lands. Whether any particular corporation can freely exercise its capacity for alienating its lands depends generally on the purposes of its existence. Corporations existing for public or charitable purposes have been in many instances placed under statutory restraints in the way of the disposal of their lands. Thus ecclesiastical corporations and colleges were restrained by statutes of Elizabeth and James I. from alienating their lands for more than twenty-one years or three lives; and sales and leases of the lands of such bodies are now regulated by numerous statutes (*j*).

Ecclesiastical corporations. Municipal corporations subject to the provisions of the Municipal Corporations Act, 1882, may not alienate corporate land (except by leasing to a limited extent) without the approval of the Treasury (*k*).

Municipal corporations. The alienation of land held for charitable purposes, whether by corporations or other trustees, was subject to the control of the Court of Chancery (*l*) and

Alienation of charity lands.

(*f*) Britton, liv. 2, Ch. 3, s. 11; Co. Litt. 2 b, 99 a; Black. Comm. i. 479; ii. 268 *et seq.*; Shelford on Mortmain, 5, 85 *et seq.*

(*g*) See Index to Statutes, Mortmain, 2, 3.

(*h*) Stat. 25 & 26 Vict. c. 89, s. 18.

(*i*) Sect. 21.

(*j*) See Co. Litt. 43 a, 44 a;

Index to Statutes, 1890, Colleges (2), Corporation (2), Ecclesiastical Commission (3), Lease (3).

(*k*) Stat. 45 & 46 Vict. c. 50, ss. 6, 108; replacing stats. 5 & 6 Will. IV. c. 76, ss. 94, 96; 6 & 7 Will. IV. c. 104, s. 2.

(*l*) 2 Maddock's Chancery Practice, 95, 3rd ed.; 1 Dart, V. & P. 19, 6th ed.

is now placed under statutory restriction (*m*). And the alienation of Crown lands has long been regulated by Parliament (*n*). It is held, moreover, that corporations created by statute for special purposes, as a Railway Company, are prohibited from dealing with their corporate property in a manner which is extraneous to the purposes for which they were created (*o*). The capacity of a corporation to contract with regard to land is commensurate with its power of disposing of land (*o*). Here it may be mentioned that it was held under the old law of uses (*p*), that a corporation, having no conscience, could not stand seised of land to others' use (*q*). But a trust may be enforced against a corporation under modern equity (*r*).

(*m*) Stat. 18 & 19 Vict. c. 124, s. 29. The alienation and conveyance of Charity lands are now regulated by stats. 16 & 17 Vict. c. 137 (ss. 21, 24, 26, 62 especially); 18 & 19 Vict. c. 124 (ss. 16, 30, 35, 36, 37 especially); 23 & 24 Vict. c. 136, s. 15; 32 & 33 Vict. c. 110, s. 12; see *Governors of the Charity for Relief of Poor Widows and Children of Clergymen v. Sutton*, 27 Beav. 651; *Royal Society of London and Thompson*, 17 Ch. D. 407; *Finnis & Young to Forbes & Pechin* (No. 2), 24 Ch. D. 591.

(*n*) *Ante*, p. 58, n. (*g*).

(*o*) *Mulliner v. Midland Railway Co.*, 11 Ch. D. 611; *Re Metropolitan District Railway Co. & Cosh*, 13 Ch. D. 607; Pollock on Contracts, 109 *et seq.* & note D., 5th ed.

(*p*) *Ante*, p. 161.

(*q*) 1 Rep. 122 a; 1 Sand. Uses, 59. For this reason, it was the practice, down to 1845, for a corporation to convey by feoffment, and not by lease and release; 1 Dart, V. & P. 600, 6th ed.

(*r*) Lewin on Trusts, 31, 8th ed.

CHAPTER XIII.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

THE next subject of our attention will be the mutual rights in respect of lands, arising from the relation of husband and wife. In pursuing this subject, let us consider, first, the rights of the husband in respect of the lands of his wife; and, secondly, the rights of the wife in respect of the lands of her husband.

The rights of the husband in respect of the lands of his wife.

1. First then, as to the rights of the husband in respect of the lands of his wife. Since the commencement of the year 1883, the legal capacity of wives, with regard to property, has been completely changed by the operation of the Married Women's Property Act, 1882 (a). But wives, who were married before the year 1883, still remain subject to the previous law, with respect to property to which their title accrued before that year (b). And without some knowledge of the old law, it would be impossible to understand the Act in question. We shall therefore first inquire into the position of wives with regard to property at common law, then examine the privileges which might be secured to them under the rules of equity, and lastly consider the rights now conferred on them by statute.

The common law as to husband and wife.

At common law, by the act of marriage, the husband and wife became in law one person, and so continued during the coverture or marriage (c). The wife was, as

(a) Stat. 45 & 46 Vict. c. 75; see Williams's Conveyancing Statutes, 873, 882, 888.

(b) Sect. 5; *Re Harris's Settled Estates*, 28 Ch. D. 171; *ante*,

p. 275.

(c) Litt. s. 168; 1 Black. Comm. 442; Gilb. Ten. 108; 1 Roper's Husband and Wife, 1.

it were, merged in her husband. Immediately upon marriage, therefore, the husband became entitled to the whole of the rents and profits which might arise from his wife's lands, and acquired a freehold estate therein, during the continuance of the coverture (*d*); and, in like manner, all the goods and personal chattels of the wife, the property in which passed by mere delivery of possession, at once belonged solely to her husband (*e*). For by the ancient common law, it was impossible that the wife should have any power of disposition over property for her separate benefit, independently of her husband. The husband also acquired by marriage a seisin (*f*) of all his wife's freeholds, jointly with her (*g*). If, how- Curtesy ever, the husband had issue by his wife born alive, that might by possibility inherit the estate as her heir, he became entitled to an estate, after the wife's death, for the residue of his own life in such lands and tenements of his wife as she was solely seised of in fee simple, or fee tail in possession (*h*). The husband, while in the enjoyment of this estate, was called a tenant by the *curtesy* of England, or more shortly, tenant by the curtesy. But the estate must have been a several one, Estate must not be joint. or else held under a tenancy in common, and must not have been one of which the wife was seised jointly, with any other person or persons (*i*). The estate must also Estate must be in possession. have been an estate in possession; for there could be no curtesy of an estate in reversion expectant on a life interest or other estate of freehold (*k*). The husband

(*d*) 1 Rop. Husband and Wife, 8; *Robertson v. Norris*, 11 Q. B. 916.

(*e*) 1 Rop. Husband and Wife, 169; see Williams on Personal Property, 481—483, 13th ed.

(*f*) *Ante*, p. 85.

(*g*) Co. Litt. 273 b, 325 b, 351 a; *Robertson v. Norris*, 11 Y. B. 916. Of the wife's freehold estates of inheritance the husband and wife were said to be seised in

fee in right of the wife; *Polyblank v. Hawkins*, 1 Doug. 329; 1 Wms. Sand. 253, n.

(*h*) Litt. ss. 35, 52, 90; Co. Litt. 29, 30; 2 Black. Comm. 126; 1 Rop. Husband and Wife, 5; *Barker v. Barker*, 2 Sim. 249.

(*i*) Co. Litt. 183 a; 1 Rop. Husband and Wife, 12.

(*k*) 2 Black. Comm. 127; Watk. Desc. 111 (121, 4th ed.).

Issue must have been born alive except as to gavelkind lands.

Issue must have been capable of inheriting as heir to the wife.

The wife must have been actually seised.

Husband's powers of disposition of his wife's freeholds.

must also have had, by his wife, issue born alive; except in the case of gavelkind lands, where the husband had a right to his curtesy, whether he had had issue or not; but, by the custom of gavelkind, curtesy extends only to a moiety of the wife's lands, and ceases if the husband marries again (*l*). The issue must also have been capable of inheriting as heir to the wife (*m*). Thus, if the wife were seised of lands in tail male, the birth of a daughter only would not entitle her husband to be tenant by curtesy; for the daughter could not by possibility inherit such an estate from her mother. And it was necessary that the wife should have acquired an actual seisin of all estates, of which it was possible that an actual seisin could be obtained; for the husband had it in his own power to obtain for his wife an actual seisin; and it was his own fault if he had not done so (*n*).

The husband could dispose of the estate which he took during coverture or by the curtesy in lands belonging to his wife at common law, without her concurrence (*o*); and it was subject to his debts in his lifetime either upon execution of a judgment against him (*p*), or on his bankruptcy (*q*). But he could make no lawful disposition of her freehold estates to endure beyond his own interest. So that, if his wife survived him, she resumed her right to her freehold estates, which could not be defeated by his debts or alienations (*r*). And if he survived her, her estates in fee

(*l*) Co. Litt. 30 a, n. (1); Bac. Abr. title Gavelkind (A); Rob. Gavel. book ii. c. 1.

(*m*) Litt. s. 52; 8 Rep. 84 b.

(*n*) 2 Black. Comm. 181; *Parker v. Carter*, 4 Hare, 416. In the first edition of this work a doubt was thrown out whether, under the new law of inheritance, a husband can ever become tenant by the curtesy to any estate which his wife has inherited. The reasons which afterwards induced

the author to incline to the contrary opinion will be found in Appendix (D). See *Eager v. Furnivall*, 17 Ch. D. 115.

(*o*) Co. Litt. 30 a; *Robertson v. Norris*, 11 Q. B. 916.

(*p*) Note (1) to *Underhill v. Devereux*, 2 Wms. Saund. 690, 6th ed.; stat. 1 & 2 Vict. c. 110, s. 11; *ante*, pp. 244 *et seq.*

(*q*) Com. Dig. Bankrupt, D (11); *ante*, p. 253.

(*r*) Litt. ss. 594, 598—600,

simple or tail descended to her heir, if she were the purchaser, or to the heir of the purchaser, if she had become entitled by descent, subject only to the husband's estate by the curtesy, if he had become entitled thereto (s). For the incapacity, under which a married woman laboured at common law, not only hindered her from making any separate disposition of her lands in her lifetime, but also prevented her from devising them by her will. By the Settled Estates Act, 1877 (t), a husband entitled to land as tenant by the curtesy, or in right of a wife who is seised in fee, has the same power of leasing as is thereby given to a tenant for life. And by the Settled Land Act, 1882 (u), a tenant by the curtesy has the powers of leasing and sale, and the other powers given to a tenant for life by that Act.

But although the husband alone could not lawfully alienate his wife's freeholds for a greater estate than his own, and the wife alone had no disposing power at all, by the common law the husband and wife together might make any such dispositions of the wife's interest in real estate as she could do if unmarried. The mode in which such dispositions were formerly effected was by a *fine* duly levied in the Court of Common Pleas. We have already had occasion to advert to fines, in

605; Co. Litt. 326 a; *Robertson v. Norris*, 11 Q. B. 916; 1 Rep. Husband and Wife, 55 *et seq.*, 187.

(s) By stat. 6 Anne, c. 18, s. 5, every husband seised in right of his wife only, who continues in possession after the determination of his estate, without the consent of the persons next entitled, shall be adjudged to be a trespasser; and the full value of the profits received during such wrongful possession may be recovered in damages against him or his executors or his administrators.

(t) Stat. 40 & 41 Vict. c. 18, s. 46; see *ante*, p. 118, n. (o). This Act replaced stat. 19 & 20 Vict. c.

120, which repealed Stat. 32 Hen. VIII. c. 28, enabling husbands seised in right of or jointly with their wives to make leases, with their wives' concurrence, of such of the lands as had been most commonly let to farm for twenty years before, for any term not exceeding twenty-one years or three lives, under the same restrictions as tenants in tail were by the same Act empowered to lease.

(u) Stat. 45 & 46 Vict. c. 38, s. 58, sub-s. 1 (viii.): 47 & 48 Vict. c. 18, s. 8; *ante*, pp. 114—120.

Husband's
powers of
leasing, &c.

Power of dis-
position of
husband and
wife together.

Fine.

respect to their former operation on estates tail (*x*). They were, as we have seen, fictitious suits commenced and then compromised by leave of the Court, whereby the lands in question were acknowledged to be the right of one of the parties. Whenever a married woman was party to a fine, it was necessary that she should be examined apart from her husband, to ascertain whether she joined in the fine of her own free-will, or was compelled to it by the threats and menaces of her husband (*y*). Having this protection, a fine by husband and wife was an effectual conveyance, as well of the wife's as of the husband's interest of every kind, in the land comprised in the fine. The cumbrous and expensive nature of fines having occasioned their abolition, provision was made by the Act of 1833 for the abolition of Fines and Recoveries (*z*) for the conveyance by deed merely of the interests of married women in real estate. By this Act, every kind of conveyance or disclaimer of freehold estates which a woman could execute if unmarried might be made by her by a deed executed with her husband's concurrence (*a*): but the separate examination, which was before necessary in the case of a fine, was still retained; and every deed, executed under the provisions of the Act, was required to be produced and *acknowledged* by the wife as her own act and deed, before a judge of one of the superior Courts at Westminster, or of any County Court, or a master in Chancery, or two commissioners (*b*), who were required, before they received the acknowledgment, to examine her apart from her husband touching her knowledge of the deed, and to ascertain whether she freely and voluntarily consented thereto (*c*). Deeds

Conveyance
by married
women under
stat. 3 & 4
Will. IV.
c. 74.

The wife
must have
acknowledged
the deed.

(*x*) *Ante*, p. 98.

(*y*) Cruise on Fines, 108, 109.

(*z*) Stat. 3 & 4 Will. IV. c. 74;
ante, p. 94. See stat. 4 & 5 Will.
IV. c. 92, as to Ireland.

(*a*) Sect. 77; stat. 3 & 9 Vict.
c. 106, s. 7.

(*b*) Stat. 3 & 4 Will. IV. c. 74;
s. 79; 51 & 52 Vict. c. 43, s. 184,
replacing 19 & 20 Vict. c. 108,
s. 78.

(*c*) Stat. 3 & 4 Will. IV. c. 74,
s. 80; *Tennent v. Welch*, 37 Ch.
D. 622. This Act also required a

executed by married women after the year 1882 may be acknowledged before one commissioner only (*d*). But without a fine at common law, or a deed acknowledged under the Act of 1833, no conveyance could formerly be made of any married woman's estate in lands at law (*e*). And this is still the law with regard to those lands of wives married before the year 1883, to which their title accrued before that year.

The rule of law, by which husband and wife were considered as one person, was occasionally productive of rather curious consequences. Thus, if lands were given to A. and B. (husband and wife), and C., a third person, and their heirs—here, had A. and B. been distinct persons, each of the three joint tenants would, as we have seen (*f*), have been entitled, as between themselves, to one-third part of the rents and profits, and would have had a power of disposition also over one-third part of the whole inheritance. But, since A. and B., being husband and wife, were only one person, they took, under such a gift, a moiety only of the rents and profits, with a power to dispose only of one-half of the inheritance (*g*); and C., the third person, took the other half, as joint tenant with them. Again, if lands were given to A. and B. (husband and wife) and their

Husband and wife considered as one person. Gift to husband and wife and a third person.

Gift to husband and wife and their heirs.

certificate of the taking of the acknowledgment to be duly signed and filed, otherwise the acknowledgment was of no effect; sects. 84–86; *Jolly v. Hancock*, 7 Ex. 820. But a certificate of the acknowledgment of deeds executed after the year 1882 is not required; stat. 45 & 46 Vict. c. 39, s. 7. The last mentioned enactment (in this respect replacing stats. 17 & 18 Vict. c. 75, & 41 & 42 Vict. c. 23) also removes doubts, which might arise in consequence of any person taking the acknowledgment being an interested party.

(*d*) Stat. 45 & 46 Vict. c. 39, s. 7.

(*e*) *Cahill v. Cahill*, 8 App. Cas. 420. But there might be given to a married woman a power of appointment enabling her to dispose of an estate in land as effectually as a single woman. See *post*, part II. Ch. III.

(*f*) *Ante*, pp. 180, 182.

(*g*) Litt. s. 291; *Gordon v. Whieldon*, 11 Beav. 170; *Re Wyld*, 2 De Gex, M. & G. 724. The rule is also applied to gifts to husband and wife and others as tenants in common; but it may be excluded by the words of the gift or the context; see *Re Dixon*, 42 Ch. D. 806.

They took by
entireties.

Husband and
wife could
not convey to
each other.

heirs—here, had they been separate persons, they would have become, under the gift, joint tenants in fee simple, and each would have been enabled, without the consent of the other, to dispose of an undivided moiety of the inheritance. But as A. and B. were one, they took, as it was said, *by entireties*; and, whilst the husband might do what he pleased with the rents and profits during the coverture, he could not dispose of any part of the inheritance, without his wife's concurrence. Unless they both agreed in making a disposition, each one of them had to run the risk of gaining the whole by survivorship, or losing it by dying first (*h*). Another consequence of the unity of husband and wife was the inability of either of them to convey to the other. As a man could not convey to himself, so he could not convey to his wife, who was regarded as part of himself (*i*). But by means of the Statute of Uses the effect of a conveyance by a man to his wife could be produced (*k*); for a man might and still may convey to another person to the use of his wife in the same manner as, under the statute, a man may convey to the use of himself (*l*). And by the Conveyancing Act of 1881, in conveyances made after the year 1881, freehold land may be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person (*m*). A man has always been able to leave lands to his wife by his will; for the married state does not deprive the husband of that disposing power which he would possess if single (*n*), and a devise by will does not take effect until after his decease (*o*).

Rules of

Next, as to the rights of married women under the

(*h*) *Doe d. Freestone v. Parratt*, 5 T. Rep. 652.

(*i*) Litt. s. 168; see Williams's Conveyancing Statutes, 391, 392.

(*k*) 1 Rep. Husb. and Wife, 58.

(*l*) *Ante*, p. 195.

(*m*) Stat. 44 & 45 Vict. c. 41,

s. 50; see Williams's Conveyancing Statutes, 228, 224, 391, 392.

(*n*) See Williams on Personal Property, 481, 13th ed.

(*o*) Litt. s. 168.

rules of equity. If lands were held on trust for a wife ^{equity as to wives' property.} for life or in fee simple or tail, but without any provision for her separate benefit, the husband was entitled to receive the rents and profits, and acquired an equitable estate therein during the continuance of the coverture (*p*). It appears, however, that in such a case the wife might, under certain circumstances, acquire a right ^{Wife's equity to a settlement.} in equity to have a provision for her maintenance secured to her by settlement of the rents and profits, or part thereof, in trust for that purpose (*q*). Equity also ^{Curtsey of equitable estate.} followed the law in giving to the husband the right to enjoy his wife's equitable estate of inheritance after her death for the rest of his own life, as tenant by the curtesy in equity, under circumstances similar to those, which gave rise to a tenancy by the curtesy at law (*r*). The wife's equitable estates might be disposed of by the husband and wife together, by the same means as they might use to convey her legal estates, but not otherwise (*s*).

In modern times, however, if property of any kind ^{Trusts for separate use enforced.} were vested in trustees, in trust to apply the income *for the separate use* of a woman during any coverture, present or future, the trust for the separate use of the wife might be enforced in equity (*t*). That is, the

(*p*) Lewin on Trusts, 748, 8th ed.

(*q*) If the husband became bankrupt, and the wife had no means of support, she might obtain such a settlement as against his assignee or trustee in bankruptcy. But she could not obtain such a settlement as against her husband, so long as he supported her; or against his assignee for valuable consideration, though her husband should, subsequently to the assignment, have ceased to support her. See *Sturgis v. Champneys*, 5 My. & Cr. 97; *Tidd v. Lister*, 10 Hare, 140; 3 De G. M. & G., 857, 869, 870; *Durham v. Crackles*, 8 Jur., N. S. 1175; *Gleaves v. Faines*, 1 De G.,

J. & S. 98, 94; *Wortham v. Pemberton*, 1 De G. & Sm. 644, 661; *Smith v. Matthews*, 8 De G., F. & J. 189; *Barnes v. Robinson*, 1 N. R. 257; Sugd. V. & P. 560, 14th ed.; Lewin on Trusts, 749, 750, 8th ed.; Williams on Settlements, 99, 100; see also *Fowke v. Draycott*, 29 Ch. D. 998.

(*r*) 1 Rep. Husb. and Wife, 18; Lewin on Trusts, 723, 728, 8th ed.; *ante*, p. 281.

(*s*) *Taylor v. Meads*, 4 De G., J. & S. 604, 605; Lewin on Trusts, 748, 8th ed.; *ante*, p. 284.

(*t*) As to the history of the introduction of this doctrine, see Haynes, Outlines of Equity, Lect. VII. pp. 217 *et seq.*, 4th ed.

Courts of Equity obliged the trustees to hold for the sole benefit of the wife, and prevented the husband from interfering with her in the disposal of such income; she consequently enjoyed the same absolute power of disposition over it as if she were sole or unmarried. And, if the income of property were given directly to a woman, for her supreme use, without the intervention of any trustee, the Court compelled her husband himself to hold his marital rights in such income simply as a trustee for his wife independently of himself (u). The limitation of property in trust for the separate use of an intended wife was one of the principal objects of a modern marriage settlement. By means of such a trust, a provision might be secured, which would be independent of the debts and liabilities of the husband, and thus free from the risk of loss, either by reason of his commercial embarrassments, or of his extravagant expenditure. In order more completely to protect the wife, the Court of Chancery allowed property thus settled for the separate use of a woman to be so tied down for her own personal benefit, that she should have no power, during her coverture, to anticipate or assign her income; for it is evident that, to place the wife's property beyond the power of her husband, is not a complete protection for her,—it must also be placed beyond the reach of his persuasion. In this particular instance, therefore, an exception has been allowed to the general rule, which forbids any restraint to be imposed on alienation. For, when the trust, under which property was held for the separate use of a woman during any coverture, declared that she should not dispose of the same or of the income thereof in any mode of anticipation, every attempted disposition by her during such coverture was deemed absolutely void (x). Not only the

Separate property may be rendered inalienable.

(u) 2 Rep. Husb. and Wife, 152, 182; *Major v. Lansley*, 2 Russ. & Mylne, 855.

(x) *Brandon v. Robinson*, 18 Ves. 434; 2 Rep. Husb. and Wife, 280; *Tullett v. Armstrong*, 1 Beav.

income, but also the *corpus* of any property, whether real or personal, might be limited to the separate use of a married woman. And in 1865 it was finally settled that a simple gift of real estate for a wife's separate use, either with or without the intervention of trustees (*y*), was sufficient to give her the power to dispose by her own act *inter vivos* or by will, with the consent or concurrence of her husband, of the whole equitable estate so limited to her (*z*). The same rule had long been established with respect to personal estate (*x*). And where lands were limited on trust for a wife in fee, for her separate use, she had the right of every *cestui que trust* in similar case (*b*), to require her trustees to convey the legal estate therein according to her direction (*c*). If the lands had been so given without the intervention of trustees, she must have conveyed the *legal* estate therein by deed acknowledged (*d*), in which she could then have compelled her husband to concur. For in the Courts of Equity, a married woman was as competent to act with respect to her separate estate as if she were single (*e*). And not only was a wife so enabled to alienate directly any part of her separate estate, but if she made any general pecuniary engagements with reference to her separate estate, her creditors, though they could have no remedy against her at law, might take proceedings in equity to have their claims satisfied out of any separate estate, to which she was entitled, without restraint on anticipation, at the time of entering into the engagement (*f*). If, however, a gift of real

As to the *corpus*.

Wife's general engagements.

1; 4 My. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 84; 4 M. & Cr. 377; *Baggett v. Meux*, 1 Collyer, 188; affirmed, 1 Ph. 627; *ante*, p. 79.

(*y*) *Hall v. Waterhouse*, 5 Giff. 64.

(*z*) *Taylor v. Meade*, 4 De G., J. & S. 597.

(*x*) *Fettiplace v. Gorges*, 1 Ves. jun. 46.

(*b*) *Ante*, p. 170.

(*c*) 4 De G., J. & S. 604; L. R., 8 Eq. 142.

(*d*) *Ante*, p. 284.

(*e*) 1 Bro. C. C. 20; Lewin on Trusts, 759, 5th ed.

(*f*) *Pike v. Fitagibbon*, 17 Ch. D. 454; Williams's Conveyancing Statutes, 398, 394, and cases there cited.

estate for the separate use of a wife had been accompanied with a restraint on anticipation of the income she was prevented from disposing thereof during her coverture, except (in the case of an estate in fee simple) by will (*g*). Nor could she subject such real estate to her general engagements (*h*). But now, under the Conveyancing Act of 1881 (*i*), a married woman may, if it appears to the Court to be for her benefit, obtain an order of the Court enabling her to deal with any property of hers, notwithstanding that she be restrained from anticipation. It was finally settled, after conflicting decisions, that a husband should have curtesy of his wife's equitable estate in fee belonging to her for her separate use, if she died possessed thereof and intestate (*k*); but not if she had disposed thereof in her lifetime or by her will (*l*).

Curtsey of wife's separate equitable estate in fee.

Married Women's Property Act, 1870.

Originally, a trust of property for the separate use of a wife could only arise by act of parties; as by antenuptial contract between husband and wife, or by the express provision of those, by whom the property was bestowed (*m*). But the Married Women's Property Act, 1870 (*n*), provided that certain kinds of property should belong to wives for their separate use (*nn*); amongst other things, the rents and profits of any freehold, copyhold or customaryhold property which should descend upon any woman, married after the passing of the Act, as heiress or co-heiress of an intestate (*o*).

(*g*) *Baggett v. Meux*, 1 Ph. 627; *Cooper v. Macdonald*, 7 Ch. D. 288.

(*h*) *Pike v. Fitzgibbon*, 17 Ch. D. 454.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 39.

(*k*) *Appleton v. Rowley*, L. R., 8 Eq. 139; *Eager v. Furnivall*, 17 Ch. D. 115; see Williams on Settlements, 105—108.

(*l*) *Cooper v. Macdonald*, 7 Ch. D. 288.

(*m*) See Lewin on Trusts, 754—757, 8th ed.

(*n*) Stat. 33 & 34 Vict. c. 93, passed 9th Aug. 1870, and repealed as from the 1st Jan., 1883, without prejudice to any right acquired while it was in force, by stat. 45 & 46 Vict. c. 75, ss. 22, 25.

(*nn*) See sects. 1, 7, 8, 10; Williams's Conveyancing Statutes, 377—382.

(*o*) Sect. 8, which, however, takes effect subject and without

The capacity of wives with regard to property was completely altered by the Married Women's Property Act, 1882 (*p*), which came into operation on the 1st of January, 1883 (*q*). By this Act, a married woman is capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (*r*). Every woman, who marries after the commencement of the Act, is entitled to hold and dispose of, as her separate property, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage (*s*). Every woman married before the commencement of the Act is entitled to hold and dispose of, as her separate property, all real and personal property, to which her title shall accrue after the commencement of the Act (*t*). But the Act is not to interfere with any settlement made (*u*) or to be made respecting the property of any married woman, or to interfere with or render inoperative any restriction against anticipation attached or to be attached to the enjoyment by a married woman of any property or income (*x*). As we have seen, the Act also gave to married women the power to contract at law with respect to their separate property, to which they are entitled without restraint on anticipation (*y*). It is thought that, if any real estate, which becomes the separate property of a wife by virtue of this Act, should have been limited to her directly, the legal estate will vest in her alone, and her husband will not acquire any

The Married
Women's
Property
Act, 1882.

prejudice to the trusts of any settlement affecting such property; and is held not to make the fee simple of such property subject to a trust for the woman's separate use; *Johnson v. Johnson*, 85 Ch. D. 345.

(*p*) Stat. 45 & 46 Vict. c. 75.

(*q*) Sect. 25.

(*r*) Sect. 1, sub-s. 1.

(*s*) Sect. 2.

(*t*) Sect. 5; see *Roid v. Roid*, 81 Ch. D. 402.

(*u*) See *Hancock v. Hancock*, 88 Ch. D. 78.

(*x*) Sect. 19.

(*y*) Sect. 1, sub-ss. 2-4; *ante*, p. 275.

Whether any
curtesy of
wife's sepa-
rate property?

estate therein or right to receive the rents and profits during the continuance of the coverture. And if any real estate should, since the commencement of the Act, be limited to trustees on trust for a wife, it is thought that her equitable estate therein will be her separate property by virtue of the Act, though no trust for her separate use should have been imposed (*a*). Whether a husband shall be tenant by the curtesy of real estate of inheritance, which has been his wife's separate property by virtue of the Act of 1882, is a question, upon which the Act itself is silent; and the point has not yet come before the Courts. But the considerations, which determined the Court to allow curtesy of an equitable estate settled to the wife's separate use in fee (*a*), are in favour of extending the husband's right to the wife's separate property under the Act. As in the case of a fee simple settled to the wife's separate use (*b*), there can be no curtesy of her statutory separate property, of which she has disposed in her lifetime or by will. The question can only arise upon her intestacy; in which event it is thought that any estate in fee simple, which was her separate property, will descend to the heir of the last purchaser, according to the previous law (*c*), subject or not to her husband's right to curtesy, as the Courts may decide (*d*).

Wife's power
of disposition
over her
separate
property.

A wife may now dispose during coverture of her statutory separate property, whether real or personal, by the same means by which a single woman may transfer property of the like nature. She may therefore convey any legal estate of freehold, which is her separate property, by deed of grant, without the necessity of acknowledgment or of her husband's concurrence (*e*).

(*a*) See Williams's Conveyancing Statutes, 382, 383, 418, 419, 421.

(*a*) *Ante*, p. 290, and cases there cited.

(*b*) *Ante*, p. 290.

(*c*) *Ante*, p. 283.

(*d*) See Williams's Conveyancing Statutes, 452, 459, 460.

(*e*) *Re Drummond and Davies*

But she may still be deprived of the power of disposition by a restraint on anticipation (*f*). So a wife may devise by will any legal estate in fee simple, which belongs to her separately under the Act. But it is held that the Act has not given to wives a general capacity of ownership similar to a man's, but has only conferred upon them a special capacity with regard to property, which is their separate property during coverture. If therefore a wife having separate property make a will during coverture, become a widow, acquire other property as a widow, and die without having re-executed her will, her will avails not to dispose of all the property belonging to her at her death (as would a widower's will (*g*)), but only passes such property as was her separate property while she was married (*h*). It is also held that the Act has not repealed the old rule of construction, that in gifts to husband and wife and others in joint tenancy or tenancy in common, the husband and wife become entitled only to the share of one person between them (*i*). But on a gift of lands to husband and wife jointly made after the commencement of the Act of 1882, it appears that they take no longer by entireties, but as joint tenants (*k*). It is thought too that a husband may now convey any real estate to his wife directly to be held by her as her separate property under the Act; and that a wife may now

Contract, 1891, 1 Ch. 524; see *ante*, p. 289.

(*f*) *Ante*, p. 288.

(*g*) *Ante*, p. 228.

(*h*) *Re Price*, 28 Ch. D. 709; *Re Cuno*, 43 Ch. D. 12. These cases followed a decision, under the previous law, that a married woman's will, disposing of her separate estate, would not pass any property she had acquired as a widow, unless re-executed during widowhood: *Willcock v. Noble*, L. R., 7 H. L. 580. In this respect, as in the case of wives' contracts, the Act of 1882 has re-

ceived a decidedly narrow interpretation. The view taken by the judges of the scope of the Act augments the probability of their deciding in favour of the husband's curtesy of his wife's separate property.

(*i*) *Re March*, 27 Ch. D. 166; *Re Supp*, 39 Ch. D. 148; see *ante*, p. 285. Another instance of narrow interpretation of the statute. This rule of construction is entirely at variance with the common sense of laymen.

(*k*) *Re March*, 27 Ch. D. 166; see *ante*, p. 286.

convey to her husband any real estate which she holds as her separate property by virtue of the Act (*l*).

Powers of wife under Settled Land Act, 1882.

Under the Settled Land Act, 1882 (*m*), if a married woman, tenant for life of land, be entitled for her separate use, or as her separate property by statute, she may exercise the powers given by the Act without her husband: but if she be otherwise entitled, these powers are exercisable by her and her husband together. A restraint on anticipation shall not prevent the exercise by a married woman of any power under this Act (*n*).

Married woman trustee.

If a married woman were a trustee of land, the legal estate therein became subject to her husband's common law rights and could only be conveyed with his concurrence in the usual way (*o*): but in equity he was merely a trustee of his legal rights, and could be compelled to execute the trust (*p*). By an Act of 1874 (*q*), however, when any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee (*r*), she may convey or surrender the same as if she were a *feme sole*. And now it is thought that, if a female trustee of land marry after the year 1882, or if land be conveyed after 1882 to a wife as trustee, she may convey the legal estate therein as her separate property under the Married Women's Property Act, 1882 (*s*).

Rights of the wife in the lands of her husband.

2. As to the rights of the wife in the lands of her husband. A man's capacity for disposing of his own estates in land remains unchanged by the act of mar-

(*l*) See Williams's Conveyancing Statutes, 391, 392, *ante*, p. 286.

(*m*) Stat. 45 & 46 Vict. c. 38, s. 61, sub-as. 2, 3.

(*n*) Sect. 61, sub-s. 6.

(*o*) *Ante*, p. 284.

(*p*) Lewin on Trusts, 10, 15, 84, 246, 8th ed.

(*q*) Stat. 37 & 38 Vict. c. 78, s. 6.

(*r*) See *Re Docwra*, 29 Ch. D. 693; *Re Cunningham and Frayling*, 1891, 2 Ch. 567.

(*s*) See Lewin on Trusts, 36, 8th ed.; 1 Dart V. & P. 13, 588, 6th ed.; Williams's Conveyancing Statutes, 386—388.

riage; and during a husband's life, the law does not give to the wife any control over his powers of disposition or any interest in the rents and profits of his land. After her husband's death, however, a widow becomes, in some cases, entitled to a life interest in part of her late husband's lands. This interest is termed the dower ^{Dower} of the wife. By the Dower Act of 1833 (*t*), the dower of women married after the 1st of January, 1834, was placed on a different footing from that of women who were married previously. But as the old law of dower continued to regulate the rights of all women who were married on or before that day, it will be desirable, in the first place, to give some account of the old law before proceeding to the new

Dower, as it existed previously to the operation of the ^{Dower previously to the Act.} Dower Act, was of very ancient origin, and retained an inconvenient property which accrued to it in the simple times when alienation of lands was far less frequent than at present. If at any time during the coverture the husband became solely seised of any estate of inheritance, that is, fee simple or fee tail, in lands to which any issue, which the wife might have had, might by possibility have been heir (*u*), she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed by her in severalty during the remainder of her life (*x*). This right having once attached to the lands, adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife, for the purpose of releasing her right to dower. This release could be effected only by means ^{Dower could only be released by fine.}

(*t*) Stat. 3 & 4 Will. IV. c. 105.

and Wife, 332.

(*u*) Litt. ss. 36, 58; 2 Black. Comm. 181; 1 Roper's Husband

(*x*) See *Dickin v. Hamer*, 1 Drew. & Smale, 234.

of a fine, in which the wife was separately examined. And when, as often happened, the wife's concurrence was not obtained on account of the expense involved in levying a fine, a defect in the title obviously existed so long as the wife lived. As the right to dower was paramount to the alienation of the husband, so it was quite independent of his debts, even of those owing to the crown (y). It was necessary, however, that the husband should be seised of an estate of inheritance at law; for the Court of Chancery, whilst it allowed to husbands curtesy of their wives' equitable estates, withheld from wives a like privilege of dower out of the equitable estates of their husbands (z). The estate, moreover, must have been held in severalty or in common, and not in joint tenancy: for the unity of interest which characterizes a joint tenancy forbids the intrusion into such a tenancy of the husband or wife of any deceased joint tenant; on the decease of any joint tenant, his surviving companions are already entitled, under the original gift, to the whole subject of the tenancy (a). The estate was also required to be an estate of inheritance in possession; although a seisin in law, obtained by the husband, was sufficient to cause his wife's right of dower to attach (b). In no case, also, was any issue required to be actually born; it was sufficient that the wife might have had issue who might have inherited. The dower of the widow in gavelkind lands consisted, and still consists, like the husband's curtesy, of a moiety, and continues only so long as she remains unmarried and chaste (c).

Dower independent of husband's debts.

A legal seisin required.

Estate must not be joint.

Dower of gavelkind lands.

In order to prevent this inconvenient right from attaching on newly-purchased lauds, and to enable the

(y) Co. Litt. 81 a; 1 Roper's Husband and Wife, 411.

(z) 1 Roper's Husband and Wife, 354.

(a) *Ibid.* 386; *ante*, p. 180 *et*

seq.

(b) Co. Litt. 81 a.

(c) Bac. Abr. tit. Gavelkind (A); Rob. Gav. book 2, c. 2.

purchaser to make a title at a future time, without his wife's concurrence, various devices were resorted to in the framing of purchase-deeds. The old-fashioned method of barring dower was to take the conveyance to the purchaser and his heirs, to the use of the purchaser and a trustee and the heirs of the purchaser; but, as to the estate of the trustee, it was declared to be in trust only for the purchaser and his heirs. By this means the purchaser and the trustee became joint tenants for life of the legal estate, and the remainder of the inheritance belonged to the purchaser. If, therefore, the purchaser died during the life of his trustee, the latter acquired in law an estate for life by survivorship; and as the husband had never been solely seised, the wife's dower never arose; whilst the estate for life of the trustee was subject in equity to any disposition which the husband might think fit to make by his will. The husband and his trustee might also, at any time during their joint lives, make a valid conveyance to a purchaser without the wife's concurrence. The defect of the plan was, that if the trustee happened to die during the husband's life, the latter became at once solely seised of an estate in fee simple in possession; and the wife's right to dower accordingly attached. Moreover, the husband could never make any conveyance of an estate in fee simple without the concurrence of his trustee so long as he lived. This plan, therefore, gave way to another method of framing purchase-deeds, which will be hereafter explained (*d*), and by means of which the wife's dower under the old law was effectually barred, whilst the husband alone, without the concurrence of any other person, could effectually convey the lands.

The right of dower might have been barred altogether by a *jointure*, agreed to be accepted by the intended wife previously to marriage, in lieu of dower.

(*d*) See *post*, the chapter on Executory Interests.

This jointure was either legal or equitable. A legal jointure was first authorized by the Statute of Uses (e), which, by turning uses into legal estates, of course render them liable to dower. Under the provisions of this statute, dower may be barred by the wife's acceptance previously to marriage, and in satisfaction of her dower, of a competent livelihood of freehold lands and tenements, to take effect in profit or possession presently after the death of the husband for the life of the wife at least (f). If the jointure were made after marriage, the wife might elect between her dower and her jointure (g). A legal jointure, however, was in modern times seldom resorted to as a method of barring dower: when any jointure was made, it was usually merely of an equitable kind; for if the intended wife were of age, and a party to the settlement, she was competent, in equity, to extinguish her title to dower upon any terms to which she might think proper to agree (h). And if the wife should have accepted an equitable jointure, the Courts of equity would effectually restrain her from setting up any claim to her dower. But in equity, as well as at law, the jointure, in order to be an absolute bar of dower, was required to be made before marriage.

Equitable
jointure.

Dower under
the Act.

The dower of women married since the 1st of January, 1834, may be barred by the acceptance of a jointure in the same manner as before: but, in their case, the doctrine of jointures is of very little moment. For, by the Dower Act (i), the dower of such women has been placed completely within the power of their husbands. Under the Act no widow is entitled to dower out of any land, which shall have been absolutely disposed of

(e) 27 Hen. VIII. c. 10.

(f) Co. Litt. 36 b; 2 Black. Comm. 137; 1 Roper's Husband and Wife, 462.

(g) 1 Roper's Husband and Wife, 468.

(h) *Ibid.* 488; *Dyke v. Rendall*, 2 De G., M. & G. 209.

(i) 3 & 4 Will. IV. c. 105, Gavelkind lands are within the Act, *Farley v. Bonham*, 2 John. & H. 177.

by her husband in his lifetime or by his will, or in which he shall have devised any estate or interest for her benefit, unless (in the latter case) a contrary intention shall be declared by his will (*k*). And all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his lands may be liable, shall be effectual as against the right of his widow to dower (*l*). The husband may also either wholly or partially deprive his wife of her right to dower, by any declaration for that purpose made by him, by any deed, or by his will (*m*). As some small compensation for these sacrifices, the Act has granted a right of dower out of lands to which the husband had a right merely without having had even a legal seisin (*n*); dower is also extended to equitable as well as legal estates of inheritance in possession, excepting of course estates in joint tenancy (*o*). The effect of the Act is evidently to deprive the wife of her dower, except as against her husband's heir at law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support,—unless, indeed, the husband should have executed a declaration to the contrary. A declaration of this kind has, unfortunately, found its way, as a sort of common form, into many purchase-deeds. Its insertion seems to have arisen from a remembrance of the troublesome nature of dower under the old law, united possibly with some misapprehension of the effect of the new enactment. But, surely, if the estate be allowed to descend, the claim of the wife is at least equal to that of the heir, supposing him a descendant of the husband; and

Declaration
against dower.

(*k*) 3 & 4 Will. IV. c. 105, ss. 4, 9; see *Lacey v. Hill*, L. R. 19 Eq. 848. *Noble*, 20 Beav. 598; 7 De Gex, M. & G. 687.
(*l*) Sect. 5; *Jones v. Jones*, 4 Kay & J. 881. (*n*) Sect. 8.
(*m*) Sects. 6, 7, 8. See *Fry v.* (*o*) Sect. 2; *Fry v. Noble*, 20 Beav. 598; *Clarke v. Franklin*, 4 Kay & J. 266.

far superior, if the heir be a lineal ancestor, or remote relation (*p*). The proper method seems therefore to be, to omit any such declaration against dower, and so to leave to the widow a prospect of sharing in the lands, in case her lord shall not think proper to dispose of them.

Leases by
tenant in
dower.

By the Settled Estates Act, 1877, every tenant in dower may grant the same leases as a tenant by the curtesy, or other tenant for life is thereby empowered to grant (*q*).

Action for
dower.

An action for dower, like other real actions, was formerly commenced in the Court of Common Pleas; and when real actions were abolished in the year 1833 (*r*), writs for the recovery of dower were excepted. In 1860 these writs were abolished (*s*), and the forms of an action for dower were assimilated to those of other common law actions (*t*). A widow's dower might also have been recovered by bill in equity (*u*). Since the Judicature Act (*x*), claims for dower are brought by action in the High Court of Justice in the ordinary form (*y*).

Bill in equity.

Intestates'
Estates Act,
1890.

As we have seen, under the Intestates' Estates Act, 1890 (*z*), a widow may acquire a further interest in her husband's real estate, besides her dower, if he die intestate after the 1st of September, 1890, leaving no issue.

(*p*) Sugd. Vend. & Pur. 545, 11th ed.

(*q*) Stat. 40 & 41 Vict. c. 18, s. 46. See *ante*, p. 113, n. (*o*).

(*r*) By stat. 3 & 4 Will. IV. c. 27, s. 36.

(*s*) Stat. 23 & 24 Vict. c. 126, s. 26.

(*t*) Sect. 27; repealed by stat. 46 & 47 Vict. c. 49.

(*u*) See *Anderson v. Pignat*, L. R., 11 Eq. 329, reversed on appeal, L. R., 8 Ch. 180, and the cases there cited.

(*x*) *Ante*, p. 157.

(*y*) See Rules of the Supreme Court, 1883, Appendix A. Pt. III. s. 4.

(*z*) Stat. 53 & 54 Vict. c. 39; *ante*, p. 208.

PART II.

OF INCORPOREAL HEREDITAMENTS.

OUR attention has hitherto been directed to the nature and incidents of freehold estates in land, of which the tenant has *possession*. As has been already explained (a), such estates are ranked in law as corporeal hereditaments, because the owner's right is accompanied with the possession of a tangible thing: while estates in or rights over land, which is in the possession of another, are termed incorporeal, as being mere rights or bare rights unaccompanied with the possession of anything tangible. Incorporeal hereditaments will form the next subject for our consideration. They are not such an obvious source of fruitful enjoyment as is the actual occupation of land: but, being *valuable* things, they are included in property as well as tangible things (b). As we have seen (c), there was formerly a further distinction between corporeal and incorporeal hereditaments in the formalities required for their transfer. For at the common law corporeal hereditaments were mainly transferable by that livery of seisin, which was essential to a feoffment; wherefore they were said to lie in livery. While incorporeal hereditaments, when transferred apart from the possession of land, were always required to be conveyed by the delivery of a sealed writing, that is, by deed (e). They were therefore said to lie in grant. For the word *grant*,

(a) *Ante*, p. 29.

(b) *Ante*, p. 5.

(c) *Ante*, p. 80.

(e) *Ante*, pp. 80, 81, 139, 145.

New enact-
ment.

though it comprehends all kinds of conveyances, yet more strictly and properly taken, is a conveyance by deed only (*f*). But as we have seen (*g*), the Act of 1845 to amend the law of real property provided that all corporeal hereditaments should be deemed to lie in grant as well as in livery (*h*); and thus made them transferable by deed in the same manner as incorporeal hereditaments. There is, accordingly, now no difference between these two classes of property, as regards means of conveyance. But the essential distinction between rights of ownership in possession and bare rights (*i*) of course remains.

(*f*) Shep. Touch. 228.

(*g*) *Ante*, p. 192.

(*h*) Stat. 8 & 9 Vict. c. 106,

s. 2.

(*i*) *Ante*, p. 5.

CHAPTER I.

OF A REVERSION AND A VESTED REMAINDER.

THE first kind of incorporeal hereditament which we shall mention is somewhat of a mixed nature, being at one time incorporeal, at another not; and, for this reason, it is not usually classed with those hereditaments which are essentially and entirely, of an incorporeal kind. But as this hereditament partakes, during its incorporeal existence, very strongly of the nature and attributes of other incorporeal hereditaments, particularly in its always permitting, and generally requiring, a deed of grant for its transfer,—it is here classed with such hereditaments. It is called, according to the mode of its creation, a *reversion* or a *vested remainder*.

If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for in each case, his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will *revert* to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the *particular* estate, being only Particular estate. a part, or *particula*, of the estate in fee (a). And, during

the continuance of such particular estate, the interest of the tenant in fee simple, which still remains undisposed of — that is, his present estate, in virtue of which he is to have again the possession at some future time — is called his *reversion* (b).

Reversion.

If at the same time with the grant of the particular estate, he should also dispose of this remaining interest or *reversion*, or any part thereof, to some other person, it then changes its name, and is termed, not a *reversion* but a *remainder* (c). Thus, if a grant be made by A., a tenant in fee simple, to B. for life, and after his decease to C. and his heirs, the whole fee simple of A. will be disposed of, and C.'s interest will be termed a *remainder*, expectant on the decease of B. A remainder, therefore, always has its origin in express grant: a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties (d).

Remainder.

A remainder arises from express grant.

• A reversion on a lease for years

1. And, first, of a reversion. If the tenant in fee simple should have made a lease merely for a term of years, his reversion is looked on, in law, precisely as a continuance of his old estate, with respect to himself and his heirs, and to all other persons but the tenant for years. The owner of the fee simple is regarded as having simply placed a bailiff on his property (e); and the consequence is, that, subject to the lease, the owner's rights of alienation remain unimpaired, and may be exercised in the same manner as before. The feudal possession or *seisin* has not been parted with. And a conveyance of the reversion may, therefore, be made by a feoffment with livery of *seisin*, made with the consent

may be conveyed by feoffment

(b) Co. Litt. 22 b, 142 b.
(c) Litt. ss. 215, 217.
(d) 2 Black. Comm. 168.

(e) Watk. Descents, 108 (112, 4th ed.); *ante*, p. 17.

of the tenant for years (*f*). But, if this mode of transfer should not be thought eligible, a grant by deed will be equally efficacious. For the estate of the grantor is strictly incorporeal, the tenant for years having the actual possession of the lands: so long, therefore, as such actual possession continues, the estate in fee simple is strictly an incorporeal reversion, which, together with the *seisin* or feudal possession, may be conveyed by deed of grant (*g*). But, if the tenant in fee simple should have made a lease for life, he must have parted with his *seisin* to the tenant for life; for an estate for life is an estate of freehold, and such tenant for life will, therefore, during his life, continue to be the freeholder, or holder of the feudal *seisin* (*h*). No feoffment can consequently be made by the tenant in fee simple; for he has no *seisin* of which to make livery. His reversion is but a fragment of his old estate, and remains purely incorporeal, until, by the dropping of the life of the grantee, it shall again become an estate in possession. Till then, that is, so long as it remains a reversion expectant on an estate of freehold, it can only be conveyed, like all other incorporeal hereditaments when apart from what is corporeal, by a deed of grant (*i*).

We have before mentioned (*h*), that in the case of a lease for life or gift in tail made by a tenant in fee simple, a tenure is created between the parties, the lessee for life or donee in tail holding his estate of the freeholder in fee as lord. So in the case of a lease for years, the lessee upon entry becomes tenant to the lessor, and the relation of the one to the other is also called a tenure (*l*);

(*f*) Co. Litt. 48 b, n. (8).
 (*g*) Perkins, s. 221; *Doe* d. *Wors* v. *Cole*, 7 Barn. & Cress. 243, 248; *ante*, pp. 151, 187.
 (*h*) Watk. Descents, 109 (114, 4th ed.); *ante*, pp. 60, 139.

(*i*) Shep. Touch. 280.
 (*k*) *Ante*, pp. 108, 107.
 (*l*) Litt. ss. 58, 132, 465, 567—572, 576, 577, 586, 590, 591; Co. Litt. 98 b.

although, as we have seen (*m*), this relation was treated as lying outside the law of free tenure. Still an oath of fealty has always been incident to the tenure of an estate for years as to that of a freehold estate (*n*). And the rent reserved on a lease for years is called *rent service* equally with the rent due from a freeholder to his lord ; and it is recoverable, if in arrear, by the same remedy of distress, which the common law accorded to the lords of freeholders for enforcing the services due from the latter (*o*). As we have seen (*p*), the oath of fealty is now never exacted, and a rent is rarely reserved on the creation of an estate for life or in tail ; as these estates usually arise under family settlements. In the case of a lease for years, however, the rent which may be reserved, is of practical importance. Rent service is so called in order to distinguish it from other kinds of rent, to be spoken of hereafter, which have nothing to do with the services anciently rendered by a tenant to his lord. It consists usually, but not necessarily, of money ; for, it may be rendered in corn, or in anything else. Thus, an annual rent of one peppercorn is sometimes reserved to be paid, when demanded, in cases where it is wished that lands should be holden rent free, and yet that the landlord should be able at any time to obtain from his tenant an acknowledgment of his tenancy. To the reservation of a rent service, a deed was formerly not absolutely necessary (*q*). For, although the rent is an incorporeal hereditament, yet the law considered that the same ceremony, by which the nature and duration of the estate were fixed and evidenced, was sufficient also to ascertain the rent to be paid for it. But, by the Act to amend the law of real property (*r*), it is pro-

Fealty.

Rent service.

A deed formerly unnecessary to the reservation of a rent.

Act to amend the law of real property.

(*m*) *Ante*, pp. 17, 18, 19, 28, 60, 61.

(*n*) Bract. fo. 80 a ; Litt. ss. 181, 132 ; Co. Litt. 67 b, 98 b.

(*o*) Litt. ss. 58, 122, 213, 214 ; Co. Litt. 87 b, 142 a, b, 148 a ;

ante, p. 68.

(*p*) *Ante*, pp. 52, 108, 108.

(*q*) Litt. s. 214 ; Co. Litt. 143 a.

(*r*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

vided, that a lease, required by law to be in writing, of any tenements or hereditaments shall be void at law, unless made by deed. In every case, therefore, where the Statute of Frauds (*s*) has required leases to be in writing, they must now be made by deed. But, according to the exception in that statute (*t*), where the lease does not exceed three years from the making, a rent of two-thirds of the full improved value, or more, may still be reserved by parol merely. Rent service, when created, is considered to be issuing out of every part of the land in respect of which it is paid (*u*): one part of the land is as much subject to it as another. The common law remedy of distress for the recovery of rent service was by seizing the goods of the tenant, or any other person, found on any part of the premises, and impounding them, as a pledge for payment (*x*). But the sale of goods distrained for rent was authorized by a statute of William and Mary (*y*). This remedy for the recovery of rent service belongs to the landlord of common right, without any express agreement (*z*).

Rent issues out of every part of the lands.

Distress.

In addition to the remedy by distress, there is usually contained in leases a condition of re-entry, empowering the landlord, in default of payment of the rent for a certain time, to re-enter on the premises and hold them as of his former estate. When such a condition is inserted, the estate of the tenant, whether for life or

Condition of re-entry.

(*s*) Stat. 29 Car. II. c. 3, *ante*, p. 148.

(*t*) Sect. 2.

(*u*) Co. Litt. 47 a, 142 a.

(*x*) Co. Litt. 47 a; 3 Black. Comm. 6—14.

(*y*) Stat. 2 Wm. & Mary, c. 5. The landlord's privilege of distress was further extended by stats. 8 Anne, c. 14; 4 Geo. II. c. 28; 11 Geo. II. c. 19; 3 & 4 Will. IV. c. 42, ss. 37, 38; 14 & 15 Vict. c. 25, s. 2. But later statutes have restricted the right to distrain for rent; see stat. 34

& 35 Vict. c. 79, protecting the goods of lodgers; 35 & 36 Vict. c. 50, protecting railway rolling stock; 46 & 47 Vict. c. 61, ss. 44—55, limiting the right to distrain upon agricultural holdings; 51 & 52 Vict. c. 21, generally amending the law of distress for rent; Woodfall, Landlord and Tenant, Ch. XI., 14th ed.

(*z*) Litt. ss. 213, 214. It must be made between sunrise and sunset, *Tutton v. Darke*, 5 H. & N. 647.

Demand
formerly
required.

Modern
proceedings.

The benefit of
a condition of
re-entry
formerly
inalienable.

years, becomes determinable on such re-entry. In former times, before any entry could be made under a proviso or condition for re-entry on non-payment of rent, the landlord was required to make a demand, upon the premises, of the precise rent due, at a convenient time before sunset of the last day when the rent could be paid according to the condition; thus, if the proviso were for re-entry on non-payment of the rent by a space of thirty days, the demand must have been made on the evening of the thirtieth day (*a*). But now, if half a year's rent is due, and no sufficient distress is found on the premises, the landlord may, at the expiration of the period limited by the proviso for re-entry (*b*), recover the premises by action, without any formal demand or entry (*c*); but all proceedings are to cease on payment by the tenant of all arrears and costs at any time before the trial (*d*). Formerly also the tenant might, at an indefinite time after he had been ejected, have filed his bill in the Court of Chancery, and he would have been relieved by that Court from the forfeiture he had incurred, on his payment to his landlord of all arrears and costs. But by a statute of George II. (now replaced by an Act of the present reign) the right of the tenant to apply for relief in equity was restricted to six calendar months next after the execution of the judgment on the ejectionment (*e*); and under an Act of 1860, the same relief was allowed to be given by the Courts of Law (*f*). In ancient times, also, the benefit of a condition of re-entry could belong only to the landlord and his heirs; for the

(*a*) 1 Wms. Saund. 287, n. (16); *Acock v. Phillips*, 5 H. & N. 183.

(*b*) *Doe d. Dixon v. Roe*, 7 C. B. 184.

(*c*) Stat. 15 & 16 Vict. c. 76, s. 210, re-enacting stat. 4 Geo. II. c. 28, s. 2. See Rules of the Supreme Court, 1883, Ord. III. r. 6.

(*d*) Stat. 15 & 16 Vict. c. 76,

s. 212, re-enacting stat. 4 Geo. II. c. 28, s. 4. An under-tenant has the same privilege, *Doe d. Wyatt v. Byron*, 1 C. B. 628.

(*e*) Stat. 4 Geo. II. c. 28, s. 2, now replaced by 15 & 16 Vict. c. 76, s. 210; *Bowser v. Colby*, 1 Hare, 109; *Stanhope v. Harworth*, 3 Times L. R. 34.

(*f*) Stat. 23 & 24 Vict. c. 126, s. 1.

law would not allow of the transfer of a mere conditiona right to put an end to the estate of another (g). A right of re-entry was considered in the same light as a right to bring an action for money due: which right in ancient times was not assignable. This doctrine sometimes occasioned considerable inconvenience; and in the reign of Henry VIII. it was found to press hardly on the grantees from the crown of the lands of the dissolved monasteries. For these grantees were of course unable to take advantage of the conditions of re-entry, which the monks had inserted in the leases of their tenants. A parliamentary remedy was, therefore, applied for the benefit of the favourites of the crown; and the opportunity was taken for making the same provision for the public at large. A statute was accordingly passed (h), ^{Remedy by statute.} which enacts, that as well the grantees of the crown as all other persons being grantees (i) or assignees, their heirs, executors, successors and assigns, shall have the like advantages against the lessees, by entry for non-payment of rent, or for doing of waste, or other forfeiture, as the lessors or grantors themselves, or their heirs or successors, might at any time have had or enjoyed; and this statute is still in force. It is also provided by the Conveyancing Act of 1881, with regard only to leases made after the year 1881 (k), that every condition of re-entry and other condition contained in a lease shall be incident to the reversionary estate in the land, and shall be capable of being enforced by the person from time to time entitled, subject to the term, to the income of the land leased. The landlord may also sue his tenant personally for rent due to him.

Rent service, being incident to the reversion, passes ^{Rent service}

(g) Litt. ss. 347, 348; Co. Litt. 265 a, n. (1).

(h) Stat. 32 Hen. VIII. c. 34; Co. Litt. 215 a; *Jeherwood v. Oldknow*, 3 Mau. & Selw. 882, 894.

(i) A lessee of the reversion is

within the Act, *Wright v. Burroughes*, 3 C. B. 685.

(k) Stat. 44 & 45 Vict. c. 41, s. 30. See Williams's Conveyancing Statutes, 104—109.

passes by
grant of the
reversion.

Attornment.

Fine.

Attornment
abolished.

by a grant of such reversion without the necessity of any express mention of the rent (*l*). Formerly no grant could be made of any reversion without the consent of the tenant, expressed by what was called his *attornment* to his new landlord (*m*). It was thought reasonable that a tenant should not have a new landlord imposed upon him without his consent; for, in early times, the relation of lord and tenant was of a much more personal nature than it is at present. The tenant, therefore, was able to prevent his lord from making a conveyance to any person whom he did not choose to accept as a landlord; for he could refuse to attorn tenant to the purchaser, and without attornment the grant was invalid. The landlord, however, had it always in his power to convey his reversion by the expensive process of a *fine* duly levied in the Court of Common Pleas; for this method of conveyance, being judicial in its nature, was carried into effect without the tenant's concurrence; and the attornment of the tenant, which for many purposes was desirable, could in such case be compelled (*n*). It can easily be imagined, that a doctrine such as this was found inconvenient when the rent paid by the tenant became the only service of any benefit rendered to the landlord. The necessity of attornment to the validity of the grant of a reversion was accordingly abolished by a statute of Anne (*o*). But the statute very properly provides (*p*), that no tenant shall be prejudiced or damaged by payment of his rent to the grantor, or by breach of any condition for non-payment of rent, before notice of the grant shall be given to him by the grantee. And by a further statute (*q*), any attornment which may be made by tenants without their landlord's consent, to strangers

(*l*) Litt. ss. 228, 229, 572; Perk. s. 113.

(*m*) Litt. ss. 551, 567, 568, 569; Co. Litt. 309 a, n. (1).

(*n*) Shep. Touch. 254.

(*o*) Stat. & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 9. See *Allcock v. Moorhouse*, 9 Q. B. D. 366.

(*p*) Sect. 10.

(*q*) Stat. 11 Geo. II. c. 19, s. 1.

claiming title to the estate of their landlords, is rendered null and void. Nothing, therefore, is now necessary for the valid conveyance of any rent service, but a grant by deed of the reversion, to which such rent is incident. When the conveyance is made to the tenant himself, it is called a *release* (r).

The doctrine, that rent service, being incident to the reversion, always follows such reversion, formerly gave rise to the curious and unpleasant consequence of the rent being sometimes lost when the reversion was destroyed. For it is possible, under certain circumstances, that an estate may be destroyed and cease to exist. For instance, suppose A. to have been a tenant of lands for a term of years, and B. to have been his undertenant for a less term of years at a certain rent; this rent was an incident of A.'s reversion, that is, of the term of years belonging to A. If, then, A.'s term should by any means have been destroyed, the rent paid to him by B. would, as an incident of such term, have been destroyed also. Now, by the rules of law, a conveyance of the immediate fee simple to A. would at once have destroyed his term,—it not being possible that the term of years and the estate in fee simple should subsist together. In legal language the term of years would have been *merged* in the larger estate in fee simple; and the term being merged and gone, it followed as a necessary consequence, that all its incidents, of which B.'s rent was one, ceased also (s). This unpleasant result was some time since provided for and obviated with respect to leases surrendered in order to be renewed,—the owners of the new leases being invested with the same right to the rent of undertenants, and the same remedy for recovery thereof, as if the original leases had been keep on foot (t). But in all other cases the

Rent formerly lost by destruction of the reversion.

Merger.

Leases surrendered in order to be renewed.

(r) *Ante*, p. 187.

(s) *Webb v. Russell*, 3 T. R.

393.

(t) Stat. 4 Geo. II. c. 28, s. 6;

inconvenience continued, until a remedy was provided by the Act to simplify the transfer of property (*u*).

Act to amend
the law of
real property.

This Act, however, was shortly afterwards repealed by the Act to amend the law of real property (*x*), which provides, in a more efficient though somewhat crabbed clause (*y*), that, when the reversion expectant on a lease, made either before or after the passing of the Act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered or merge, the estate, which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

A remainder.

2. A remainder chiefly differs from a reversion in this,—that between the owner of the particular estate and the owner of the remainder (called the remainderman) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and one of them has no more right to be lord than the other. But as all estates must be holden of some person,—in the case of a grant of a particular estate with a remainder in fee simple,—the particular tenant and the remainderman both hold their estates of the same chief lord as their grantor held before (*z*). It consequently follows, that no rent service is incident to a remainder, as it usually is to a reversion; for rent service is an incident of tenure, and in this case no tenure exists. The other point of difference between a reversion and a remainder we have already noticed (*a*),

No tenure be-
tween parti-
cular tenant
and remain-
derman.

No rent
service.

8 Prest. Conv. 138; *Cousins v. Phillips*, 3 Hurlst. & Colt. 892; extended to crown lands by stat. 8 & 9 Vict. c. 99, s. 7.
(*u*) Stat. 7 & 8 Vict. c. 76,

s. 12.
(*x*) Stat. 8 & 9 Vict. c. 106.
(*y*) Sect. 9.
(*z*) Litt. s. 215.
(*a*) *Ante*, p. 304.

namely, that a reversion arises necessarily from the grant of the particular estate, being simply that part of the estate of the grantor which remains undisposed of, but a remainder is always itself created by an express grant.

We have seen that the powers of alienation possessed by a tenant in fee simple enable him to make a lease for a term of years, or for life, or a gift in tail, as well as to grant an estate in fee simple. But these powers are not simply in the alternative, for he may exercise all these powers of alienation at one and the same moment; provided, of course, that his grantees come in one at a time, in some prescribed order, the one waiting for liberty to enter until the estate of the other is determined. In such a case the ordinary mode of conveyance is alone made use of; and until the passing of the Act to amend the law of real property (*b*), if a feoffment should have been employed, there would have been no occasion for a *deed* to limit or mark out the estates of those who could not have immediate possession (*c*). The seisin would have been delivered to the first person who was to have possession (*d*); and if such person was to have been only a tenant for a term of years, such seisin would have immediately vested in the prescribed owner of the first estate of freehold, whose bailiff the tenant for years is accounted to be. From such first freeholder, on the determination of his estate, the seisin, by whatever means vested in him, will devolve on the other grantees of freehold estates in the order in which their estates are limited to come into possession. So long as a regular order is thus laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many

Powers of alienation may be exercised concurrently.

(*b*) Stat. 8 & 9 Vict. c. 106, s. 3; *ante*, p. 149. (*d*) Litt. s. 60; 2 Black. Comm. 167.
c Litt. s. 60; Co. Litt. 148 a.

Example.

persons the same estate is bestowed. Thus, a grant may be made at once to fifty different people separately for their lives. In such case the grantee for life who is first to have the possession is the particular tenant to whom, on a feoffment, seisin would be delivered, and all the rest are remaindermen; whilst the reversion in fee simple, expectant on the decease of them all, remains with the grantor. The second grantee for life has a remainder expectant on the decease of the first, and will be entitled to possession on the determination of the estate of the first, either by his decease, or in case of his forfeiture, or otherwise. The third grantee must wait till the estate both of the first and second shall have determined; and so of the rest. The mode in which such a set of estates would be marked out is as follows: — To A. for his life, and after his decease to B. for his life, and after his decease to C. for his life, and so on. This method of limitation is quite sufficient for the purpose, although it by no means expresses all that is meant. The estates of B. and C. and the rest are intended to be as immediately and effectually vested in them, as the estate of A.; so that if A. were to forfeit his estate, B. would have an immediate right to the possession: and so again C. would have a right to enter, whenever the estates both of A. and B. might determine. But owing to the necessary infirmity of language, all this cannot be expressed in the limitations of every ordinary deed. The words “and after his decease” are, therefore, considered a sufficient expression of an intention to confer a vested remainder after an estate for life. In the case we have selected of numerous estates, every one given only for the life of each grantee, it is manifest that very many of the grantees can derive no benefit; and should the first grantee survive all the others, and not forfeit his estate, not one of them will take anything. Nevertheless each one of these grantees has an estate for life in remainder, immediately *vested* in him; and

Words used
to confer a
vested re-
mainder after
a life interest.

each of these remainders is capable of being transferred, both at law and in equity, by a deed of grant, in the same manner as a reversion. In the same way, a grant may be made of a term of years to one person, an estate for life to another, an estate in tail to a third, and last of all an estate in fee simple to a fourth; and these grantees may be entitled to possession in any prescribed order, except as to the grantee of the estate in fee simple, who must necessarily come last; for his estate, if not literally interminable, yet carries with it an interminable power of alienation, which would keep all the other grantees for ever out of possession. But the estate tail may come first into possession, then the estate for life, and then the term of years; or the order may be reversed, and the term of years come first, then the estate for life, then the estate tail, and lastly the estate in fee simple, which, as we have said, must wait for possession till all the others shall have been determined. When a remainder comes after an estate tail, it is liable to be barred by the tenant in tail, as we have already seen. This risk it must run. But, if any estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine,—it is then a *vested remainder*, and recognized in law as an estate grantable by deed (e). It would be an estate in possession, were it not that other estates have a prior claim; and their priority alone postpones, or perhaps may entirely prevent, possession being taken by the remainderman. The gift is immediate; but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession.

A vested remainder may be conveyed by deed of grant.

Definition of a vested remainder.

In all the cases which we have as yet considered, each

(e) Fearn, Cont. Rem. 216; 2 Prest. Abst. 113.

One person
may have
more than
one estate.

Rule in
Shelley's case.

of the remainders has belonged to a different person. No one person has had more than one estate. A., B. and C. may each have had estates for life; or the one may have had a term of years, the other an estate for life, and the last a remainder in tail or in fee simple. But no one of them has as yet had more than one estate. It is possible, however, that one person may have, under certain circumstances, more than one estate in the same land at the same time,—one of his estates being in possession, and the other in remainder, or perhaps all of them being remainders. The limitation of a remainder in tail, or in fee simple to a person who has already an estate of freehold, as for life, is governed by a rule of law, known by the name of the rule in *Shelley's case*,—so called from a celebrated case in Lord Coke's time, in which the subject was much discussed (*f*),—although the rule itself is of very ancient date (*g*). As this rule is generally supposed to be highly technical, and founded on principles not easily to be perceived, it may be well to proceed gradually in the attempt to explain it.

Grantee of a
feudal estate
regarded as
taking only
a personal
interest.

We have seen that, according to feudal law, the grantee of an hereditary fief was considered as being entitled during personal enjoyment only, that is, for his life; while his heir was regarded as having been endowed with a substantial interest in the land. And these conceptions seem to have been imported into English law along with the principle of tenure (*h*). In early times after the Conquest therefore, if a grant of land were made to a man and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his

(*f*) *Shelley's case*, 1 Rep. 94, 941, n. (*c*); 38 Edw. III. 26; 104.

(*g*) Year Book, 18 Edw. II. 577, translated 7 Man. & Gran.

40 Edw. III. 9.
(*h*) *Ante*, p. 63.

lord ; much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out in different parts of the preceding chapters (i). A tenant in fee simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs, to hold after his decease. It cannot, therefore, be wondered at, that a gift, expressly in these terms, "To A. for his life, and after his decease to his heirs," should have been anciently regarded as identical with a gift to A. and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the purpose of satisfying the debts of the present tenant, the same rule still holds ; and a grant to A. for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents ; and in the same manner a grant to 'A. for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to A. and his heirs, or to A. and the heirs of his body, the words *heirs*, and *heirs of his body*, are said to be *words of limitation*; that is, words which limit or mark out the estate to be taken by the grantee (ii). At the present

To A. for his life, and after his decease to his heirs.

Words of limitation.

(i) *Ante*, pp. 62—71.

(ii) See *ante*, pp. 140—142 ;

Perrin v. Blake, *ante*, p. 280.

day, when the heir is perhaps the last person likely to get the estate, those words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee — as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave the estate to the heirs, or the heirs of the body of the grantee, after his decease, according to the letter of the gift. The circumstance, that a man's estate was to go to his heir, was the very thing which, afterwards, enabled him to convey to another an estate in fee simple (j). And the circumstance, that it was to go to the heir of his body, was that which alone enabled him, in after times, to bar an estate tail and dispose of the lands entailed by means of a common recovery.

Rule in
Shelley's case,
as to estates
in possession.

Having proceeded thus far, we have already mastered the first branch of the rule in *Shelley's case*, namely, that which relates to estates in possession. This part of the rule is, in fact, a mere enunciation of the proposition already explained, that when the ancestor, by any gift or conveyance, takes an estate for life, and in the same gift or conveyance, an estate is immediately limited to his heirs in fee or in tail, the words "to his heirs" are words of limitation of the estate of the ancestor. Suppose, however, that it should anciently have been wished to interpose between the enjoyment of the lands by the ancestor and the enjoyment by the heir, the possession of some other party for some limited estate, as for his own life. Thus, let the estate have been given to A. and his heirs, but with a vested estate to B. for his own life, to take effect in possession next after the decease of A.—thus suspending the enjoyment of the lands by the heir of A., until after the determination of the life estate of B. In such a case it is evident that B. would have had a vested estate for

As to estates
in remainder.

(j) *Ante*, p. 66.

his life, in remainder, expectant on the decease of A.; and the manner in which such remainder would have been limited, would, as we have seen (*k*), have been to A. for his life, and after his decease to B. for his life. The only question then remaining would be as to the mode of expressing the rest of his intention,—namely, that, subject to B.'s life estate, A. should have an estate in fee simple. To this case the same reasoning applies, as we have already made use of in the case of an estate to A. for his life, and after his decease to his heirs. For an estate in fee simple is an estate, by its very terms, to a man and his heirs. But, in the present case, A. would have already had *his* estate given him by the first limitation to himself for his life; nothing, therefore, would remain but to give the estate to his heirs, in order to complete the fee simple. The last remainder would, therefore, be to the heirs of A.; and the limitations would run thus: "To A. for his life, and after his decease to B. for his life, and after his decease to the heirs of A." The heir, in this case, would not have taken any estate independently of his ancestor, any more than in the common limitation to A and his heirs: the heir would have claimed the estate only by its descent from his ancestor, who had previously enjoyed it during his life; and the interposition of the estate of B. would have merely postponed that enjoyment by the heir, which would otherwise have been immediate. But we have seen that the very circumstance of a man's having an estate which is to go to his heir will now give him a power of alienation either by deed or will, and enable him altogether to defeat his heir's expectations. And, in a case like the present, the same privilege will now be enjoyed by A.; for, whilst he cannot by any means defeat the vested remainder belonging to B. for his life, he may, subject to B.'s life interest, dispose of the whole fee simple at

(*k*) *Ante*, p. 314.

his own discretion. A. therefore will now have in these lands, so long as B. lives, two estates, one in possession and the other in remainder. In possession A. has, with regard to B., an estate only for his own life. In remainder, expectant on the decease of B., he has, in consequence of his life interest being followed by a limitation to his heirs, a complete estate in fee simple. The right of B. to the possession, after A.'s decease, is the only thing which keeps the estate apart, and divides it, as it were, in two. If, therefore, B. should die during A.'s life, A. will be tenant for his own life with an immediate remainder to his heirs; in other words, he will be tenant to himself and his heirs, and will enjoy, without any interruption, all the privileges belonging to a tenant in fee simple.

Remainder to
the heirs of
the body.

By a parity of reasoning a similar result would follow, if the remainder were to the heirs of the body of A., or for an estate in tail, instead of an estate in fee simple. The limitation to the heirs of the body of A. would coalesce, as it is said, with his life estate, and give him an estate tail in remainder, expectant on the decease of B.; and if B. were to die during his lifetime, A. would become a complete tenant in tail in possession.

Any number
of estates may
interpose.

The example we have chosen, of an intermediate estate to B. for life, is founded on a principle evidently applicable to any number of intermediate estates, interposed between the enjoyment of the ancestor and that of his heir. Nor is it at all necessary that all these estates should be for life only; for some of them may be larger estates, as estates in tail. For instance, suppose lands given to A. for his life, and after his decease to B. and the heirs of his body, and in default of such issue (which is the method of expressing a remainder after an estate tail), to the heirs of A. In this case A. will have an estate for life in possession,

Intermediate
estate tail.

with an estate in fee simple remainder, expectant on the determination of B.'s estate tail. An important Example. case of this kind arose in the reign of Edward III. (d). Lands were given to one John de Sutton for his life, the remainder, after his decease, to John his son, and Eline, the wife of John the son, and the heirs of their bodies; and in default of such issue, to the right heirs of John the father. John the father died first; then, John and Eline entered into possession. John the son then died, and afterwards Eline his wife, without leaving any heir of her body. R., another son, and heir at law of John de Sutton, the father, then entered. And it was decided by all the Justices that he was liable to pay a *relief* (m) to the chief lord of the fee, on account of the descent of the lands to himself from John the father. Thorpe, who seems to have been a judge, thus explained the reason of the decision:—"You are in as heir to your father, and your brother [father?] had the freehold before; at which time, if John his son and Eline had died [without issue] in his lifetime, he would have been tenant in fee simple."

The same principles will apply where the first estate Where the first estate is an estate tail. is an estate in tail, instead of an estate for life. Thus, suppose lands to be given to A. and the heirs male of his body begotten, and in default of such issue, to the heirs female of his body begotten (n). Here, in default of male heirs of the body of A., the heirs female will inherit from their ancestor the estate in tail female, which by the gift had vested in him. There is no need to repeat the estate which the ancestor enjoys for his life, and to limit the lands, in default of heirs male, to him and to the heirs female of his body begotten. This part of his estate in tail female has been already given

(d) *Provost of Beverley's case*, Year Book, 40 Edw. III. 9. See 1 Prest. Estates, 804.

W.R.P.

(m) *Ante*, p. 45.

(n) Litt. s. 719; Co. Litt. 376 b.

Rule in *Shelley's case*.

to him in limiting the estate in tail male. The heirs female, being mentioned in the gift, will be supposed to take the land as heirs, that is, by descent from their ancestor, in whom an estate in tail female must consequently be vested in his lifetime. For, the same rule, founded on the same principle, will apply in every instance; and this rule is no other than the rule in *Shelley's case*, which lays it down for law, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, *either mediately or immediately*, to his heirs in fee or in tail, the words "the heirs" are words of limitation of the estate of the ancestor. The heir, if he should take any interest, must take as heir by descent from his ancestor; for he is not constituted, by the words of the gift or conveyance, a *purchaser* of any separate and independent estate for himself.

Ancestor need not have an estate for the whole of his life.

The rule, it will be observed, requires that an estate of freehold merely should be taken by the ancestor, and not necessarily an estate for the whole of his own life or in tail. In the examples we have given, the ancestor has had an estate at least for his own life, and the enjoyment of the lands by other parties has postponed the enjoyment by his heirs. But the ancestor himself, as well as his heirs, may be deprived of possession for a time; and yet an estate in fee simple or fee tail may be effectually vested in the ancestor, subject to such deprivation. For instance, suppose lands to be given to A., a widow, during her life, provided she continue a widow and unmarried, and after her marriage to B. and his heirs during her life, and after her decease, to her heirs. Here, A. has an estate in fee simple, subject to the remainder to B. for her life, expectant on the event of her marrying again (o). For to

apply to this case the same reasoning as to the former ones, A. has still an estate to her and to her heirs. She has the freehold or feudal possession, and, after her decease, her heirs are to have the same. It matters not to them that a stranger may take it for a while. The terms of the gift declare that what was once enjoyed by the ancestor, shall afterwards be enjoyed by the heirs of such ancestor. These very terms then make an estate in fee simple, with all its incidental powers of alienation, controlled only by the rights of B. in respect of the estate conferred on him by the same gift.

But if the ancestor should take no estate of freehold under the gift, but the land should be granted only to his heirs, a very different effect would be produced. In such a case a most material part of the definition of an estate in fee simple would be wanting. For an estate in fee simple is an estate given to a man and his heirs, and not merely to the heirs of a man. The ancestor, to whose heirs the lands were granted, would accordingly take no estate or interest by reason of the gift to his heirs. But the gift, if it should ever take effect, would be a future contingent estate for the person who, at the ancestor's decease, should answer the description of heir to his freehold estates. The gift would accordingly fall within the class of future estates, of which an explanation is endeavoured to be given in the next chapter (p).

Where the ancestor takes no estate of freehold.

(p) The most concise account of the rule in *Shelley's case*, together with the principal distinctions which it involves, is that given by Mr. Watkins in his *Essay on the Law of Descents*, pp. 154 *et seq.* (194, 4th ed.).

CHAPTER II.

OF A CONTINGENT REMAINDER.

Vested remainders did not render the land inalienable.

HITHERTO we have observed a very extensive power of alienation possessed by a tenant in fee simple. He might make an immediate grant, not of one estate merely, or two, but of as many as he might please, provided he ascertained the order in which his grantees were to take possession (a). This power of alienation, it will be observed, might in some degree render less easy the alienation of the land at a future time; for, it is plain that no sale could be made of an unincumbered estate in fee simple in the lands, unless every owner of each of these estates would concur in the sale, and convey his individual interest, whether he were the particular tenant, or the owner of any one of the estates in remainder (b). But if all these owners were to concur, a valid conveyance of an estate in fee simple could at any time be made. The exercise of the power of alienation in the creation of vested remainders, did not, therefore, withdraw the land for a moment from that constant liability to complete alienation, which it has been the sound policy of modern law as much as possible to encourage.

Future estates.

But, great as is the power thus possessed, the law has granted to a tenant in fee simple, and to every other owner to the extent of his estate, a greater power still. For, it enables him, under certain restrictions, to grant estates to commence in interest, and not in possession

(a) *Ante*, pp. 813—815.

(b) See *ante*, pp. 112, 113.

merely, at a future time. So that during the period which may elapse before the commencement of such estates, the land may be withdrawn from its former liability to complete alienation, and be tied up for the benefit of those who may become the owners of such future estates. The power of alienation is thus allowed to be exercised in some degree to its own destruction. For, till such future estates come into existence, they may have no owners to convey them. Of these future estates there are two kinds, a contingent remainder, and an executory interest. The former is allowed to be created by any mode of conveyance. The latter can arise only by the instrumentality of a will, or of a *use* executed, or made into an estate by the Statute of Uses. The nature of an executory interest will be explained in the next chapter. The present will be devoted to contingent remainders (*c*).

The simplicity of the common law allowed of the creation of no other estates than particular estates, followed by the vested remainders, which have already occupied our attention. A contingent remainder—a remainder not vested, and which never might vest,—was long regarded as illegal. Down to the reign of Henry VI. not one instance is to be found of a contingent remainder being held valid (*d*). The early authorities on the contrary are rather opposed to such a conclusion (*e*). And, at a later period, the authority

Contingent
remainders
were anciently
illegal.

(c) Contingent remainders were abolished by stat. 7 & 8 Vict. c. 76, s. 8, but were revived by stat. 8 & 9 Vict. c. 106, s. 1, by which the former Act, so far as it abolished contingent remainders, was repealed as from the time of its taking effect.

(d) The reader should be informed that this assertion is grounded only on the author's researches. The general opinion appears to be in favour of the

antiquity of contingent remainders. See Third Report of Real Property Commissioners, p. 23; 1 Steph. Com. 615, n. (c), 6th ed. And an attempt to create a contingent remainder appears in an undated deed in Madox's *Formulare Anglicanum*, No. 535, p. 305. See, too, Bract. fo. 13 a; Fleta, p. 179; Britton (ed. Nichols), i. 281 and n. (f), and *Introd.* ix.—lxiii.

(e) Year Book, 11 Hen. IV. 74,

of Littleton is express (*f*), that every remainder, which beginneth by a deed, must be *in* him to whom it is limited, before livery of seisin is made to him who is to have the immediate freehold. It appears, however, to have been adjudged, in the reign of Henry VI., that if land be given to a man for his life, with remainder to the right heirs of another *who is living*, and who afterwards dies, and then the tenant for life dies, the heir of the stranger shall have this land; and yet it was said that, at the time of the grant, the remainder was in a manner void (*g*). This decision ultimately prevailed.

Gift to A. for life with remainder to the right heirs of J. S.

And the same case is accordingly put by Perkins, who lays it down, that if land be leased to A. for life, the remainder to the right heirs of J. S., who is alive at the time of the lease, this remainder is good, because there

pl. 14; in which case, a remainder to the right heirs of a man *who was dead before the remainder was limited*, was held to vest by purchase in the person who was heir. But it was said by Hankey, J., that if a gift were made to one for his life, with remainder to the right heirs of a man *who was living*, the remainder would be void, because the fee ought to pass immediately to him to whom it was limited. Note, also, that in *Mandeville's case* (Co. Litt. 26 b), which is an ancient case of the heir of the body taking by purchase, the ancestor was *dead* at the time of the gift. The cases of rents are not apposite, as a diversity was long taken between a grant of a rent and a conveyance of the freehold. The decision in H. 7 Hen. IV. 6 b, pl. 2, cited in *Archer's case* (1 Rep. 66 b), was on a case of a rent-charge. The authority of P. 11 Rich. II. Fitz. Abr. tit. Detinue, 46, which is cited in *Archer's case* (1 Rep. 67 a), and in *Chudleigh's case* (1 Rep. 135 b), as well as in the margin of Co. Litt. 878 a, is merely a statement by the judge of the opinion of the counsel against

whom the decision was made. It runs as follows:—"Cherton to Rykhill—You think (*vous guidez*) that inasmuch as A. S. was living at the time of the remainder being limited, that if he was dead at the time of the remainder falling in, and had a right heir at the time of the remainder falling in, that the remainder would be good enough? Rykhill—Yes, Sir.—And afterwards in Trinity Term, judgment was given in favour of Wad [the opposite counsel]: *quod nota bene*."

It is curious that so much pains should have been taken by modern lawyers to explain the reasons why a remainder to the heirs of a person who takes a prior estate of freehold, should not have been held to be a contingent remainder (see Fearne, Cont. Rem. 83 *et seq.*), when the construction adopted (subsequently called the rule in *Shelley's case*) was decided on before contingent remainders were allowed.

(*f*) Litt. s. 721; see also M. 27 Hen. VIII. 24 a, pl. 2.

(*g*) Year Book, 9 Hen. VI. 24 a; H. 32 Hen. VI. Fitz. Abr. tit. Feoffments and Ffaits, 99.

is one named in the lease (namely, A. the lessee for life), who may take immediately in the beginning of the lease (*h*). This appears to have been the first instance in which a contingent remainder was allowed. In this case J. S. takes no estate at all; A. has a life interest; and, so long as J. S. is living, the remainder in fee does not vest in any person under the gift; for the maxim is *nemo est hæres viventis*, and J. S. being alive, there is no such person living as his heir. Here, accordingly, is a future estate, which will have no existence until the decease of J. S.; if, however, J. S. should die in the lifetime of A., and if he should leave an heir, such heir will then acquire a vested remainder in fee simple, expectant on A.'s life interest. But, until these contingencies happen or fail, the limitation to the right heirs of J. S. confers no present estate on any one, but merely gives rise to the prospect of a future estate, and creates an interest of that kind which is known as a *contingent remainder* (*i*).

When contingent remainders began to be allowed, a question arose, which is yet scarcely settled, what becomes of the inheritance, in such a case as this, during the life of J. S.? A., the tenant for life, has but a life interest; J. S. has nothing, and his heir is not yet in existence. The ancient doctrine, that the remainder must vest at once or not at all, had been broken in upon; but the judges could not make up their minds also to infringe on the corresponding rule, that the fee simple must, on every feoffment which

What becomes of the inheritance until the contingency happens.

(*h*) Perk. s. 52.

(*i*) 3 Rep. 20 a, in *Boraston's case*. The gift to the *heirs* of J. S. has been determined to be sufficient to confer an estate in fee simple on the person who may be his heir, without any additional limitation to the heirs of such heir; 2 Jarm. Wills, 61, 62, 4th ed. If, however, the gift

be made after the 31st of December, 1833, or by the will of a testator who shall have died after that day, the land will descend, on the decease of the heir intestate, not to *his* heir, but to the next heir of J. S., in the same manner as if J. S. had been first entitled to the estate; stat. 3 & 4 Will. IV. c. 106, s. 4.

A gift to the heirs of a man confers a fee simple on his heir.

confers an estate in fee, at once depart out of the feoffor. They, therefore, sagely reconciled the rule which they left standing to the contingent remainders which they had determined to introduce, by affirming that, during the contingency, the inheritance was either in abeyance, or *in gremio legis* or else *in nubibus* (*k*). Modern lawyers, however, venture to assert, that what the grantor has not disposed of must remain in him, and cannot pass from him until there exists some grantee to receive it (*l*). And when the gift is by way of use under the Statute of Uses, there is no doubt that, until the contingency occurs, the use, and with it the inheritance, result to the grantor. So, in the case of a will, the inheritance, until the contingency happens, descends to the heir of the testator, unless disposed of by a residuary or specific devise (*m*).

But whatever difficulties may have beset the departure from ancient rules, the necessities of society required that future estates to vest in unborn or unascertained persons, should under certain circumstances be allowed. And, in the time of Lord Coke, the validity of a gift in remainder to become vested on some future contingency, was well established. Since his day the doctrine of contingent remainders has gradually become settled; so that, notwithstanding the uncertainty still remaining with regard to one or two points, the whole system now presents a beautiful specimen of an endless variety of complex cases, all reducible to a few plain and simple principles. To this desirable end the masterly treatise of Mr. Fearne on this subject (*n*) has mainly contributed.

In Lord Coke's time contingent remainders were well established. The doctrine now settled.

Mr. Fearn's treatise.

(*k*) Co. Litt. 342 b; 1 P. Wms. 518, 519; Bac. Abr. tit. Remainder and Reversion (*c*).

(*l*) Fearn, Cont. Rem. 381. See, however, 2 Prest. Abst. 100—107, where the old opinion is maintained.

(*m*) Fearn, Cont. Rem. 351;

Egerton v. Massey, 8 C. B., N. S. 358; Williams on Settlements, 207—210; *Re Frost*, 43 Ch. D. 246.

(*n*) Fearn's Essay on the Learning of Contingent Remainders and Executory Devises. The last edition of this work has been

Let us now obtain an accurate notion of what a contingent remainder is, and, afterwards, consider the rules which are required to be observed in its creation. We have already said that a contingent remainder is a future estate. As distinguished from an executory interest, to be hereafter spoken of, it is a future estate, which waits for and depends on the determination of the estates which precede it. But, as distinguished from a vested remainder, it is an estate in remainder, which is *not* ready, from its commencement to its end, to come into possession at any moment when the prior estates may happen to determine. For if any contingent remainder should, at any time, become thus ready to come into immediate possession whenever the prior estates may determine, it will then be contingent no longer, but will at once become a vested remainder (o). For example, suppose that a gift be made to A., a bachelor, for his life, and after the determination of that estate, by forfeiture or otherwise in his lifetime, to B. and his heirs during the life of A., and after the decease of A., to the eldest son of A. and the heirs of the body of such son. Here we have two remainders, one of which is vested, and the other contingent. The estate of B. is vested (p). Why? Because, though it be but a small estate, yet it is ready from the first, and so long as it lasts, continues ready to come into possession, whenever A.'s estate may happen to determine. There may be very little doubt but that A. will commit no forfeiture, but will hold the estate as long as he lives. But, if his estate should determine the moment after the grant, or at any time *whilst B.'s estate lasts*, there is B. quite ready to take possession. B.'s estate, therefore, is vested. But the estate tail to

Definition of
a contingent
remainder.

Example.

rendered valuable by an original view of executory interests, contained in a second volume, appended by the learned editor,

Mr. Josiah William Smith.

(o) See *ante*, p. 815.

(p) Fearn, Cont. Rem. pp. 7 n, 325.

the eldest son of A. is plainly contingent. For A., being a bachelor, has no son; and, if he should die without one, the estate tail in remainder will *not* be ready to come into possession immediately on the determination of the particular estates of A. and B. Indeed, in this case there will be no estate tail at all. But if A. should marry and have a son, the estate tail will at once become a vested remainder; for, so long as it lasts, that is, so long as the son or any of the son's issue may live, the estate tail is ready to come into immediate possession whenever the prior estates may determine, whether by A.'s death, or by B.'s forfeiture, supposing him to have got possession (*q*). It will be observed that here there is an estate, which, at the time of the grant, is future in interest, as well as in possession; and till the son is born, or rather till he comes of age, the lands are tied up, and placed beyond the power of complete alienation. This example of a contingent remainder is here given as by far the most usual, being that which occurs every day in the settlement of landed estates.

Principal rule for the creation of a contingent remainder.

Ancient notoriety of transfer of the feudal possession.

Of the rules required for the creation of a contingent remainder the first and principal is, that the seisin, or feudal possession, must never be without an owner; and this rule is sometimes expressed as follows, that every contingent remainder of an estate of freehold must have a particular estate of freehold to support it (*r*). The ancient law regarded the feudal possession of lands as a matter the transfer of which ought to be notorious; and it accordingly forbade the conveyance of any estate of freehold by any other means than an immediate delivery of the seisin, accompanied by words, either written or openly spoken, by which the owner of the feudal possession might at any time thereafter be known to all

(*q*) See *ante*, pp. 314, 315.

(*r*) 1 Rep. 180 a, 184 b, 188 a; 2 Bl. Comm. 171.

the neighbourhood. If, on the occasion of any feoffment, such feudal possession was not at once parted with, it remained for ever with the grantor. Thus a feoffment, or any other conveyance of a freehold, made to-day to A., to hold from to-morrow, would be absolutely void, as involving a contradiction. For if A. is not to have the seisin till to-morrow, it must not be given him till then (*s*). So, if, on any conveyance, the feudal possession were given to accompany any estate or estates less than an estate in fee simple, the moment such estates, or the last of them, determined, such feudal possession would again revert to the grantor, in right of his old estate, and could not be again parted with by him, without a fresh conveyance of the freehold. Accordingly, suppose a feoffment to be made to A. for his life, and after his decease and one day, to B. and his heirs. Here, the moment that A.'s estate determines by his death, the feudal possession, which is not to belong to B. till one day afterwards, reverts to the feoffor, and cannot be taken out of him without a new feoffment. The consequence is, that the gift of the future estate, intended to be made to B., is absolutely void. Had it been held good, the feudal possession would have been for one day without any owner; or, in other words, there would have been a so-called remainder of an estate of freehold, without a particular estate of freehold to support it. Let us now take the case we have before referred to, of an estate to A., a bachelor, for his life, and after his decease to his eldest son in tail. In this case it is evident, that the moment A.'s estate determines by his death, his son, if living, must necessarily be ready at once to take the feudal possession in respect to his estate tail. The only case in which the feudal possession could, under such a limitation, ever be without an owner, at the

Example, a feoffment to A. to-day to hold from to-morrow.

To A. for life, and after his decease and one day, to B.

To A. for his life, and after his decease to his eldest son in tail.

(*s*) *Buckler's case*, 2 Rep. 55; 5 Rep. 94 b; 2 Bl. Comm. 166.

Posthumous children may take estates as if born.

time of A.'s decease, would be that of the mother being then *enceinte* of the son. In such a case the feudal possession would be evidently without an owner, until the birth of the son; and such posthumous son would accordingly lose his estate, were it not for a special provision which has been made in his favour. In the reign of William III. an Act of Parliament (*t*) was passed to enable posthumous children to take estates, as if born in their father's lifetime. And the law now considers every child *en ventre sa mère* as actually born, for the purpose of taking any benefit to which, if born, it would be entitled (*u*).

A contingent remainder must vest during the particular estate, or *eo instanti* that it determines.

Example.

As a corollary to the rule above laid down, arises another proposition, frequently itself laid down as a distinct rule, namely, that every contingent remainder must vest, or become an actual estate, during the continuance of the particular estate which supports it, or *eo instanti* that such particular estate determines; otherwise such contingent remainder will fail altogether, and can never become an actual estate at all. Thus, suppose lands to be given to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-four years. As a contingent remainder the estate to the son is well created (*x*); for the feudal seisin is not necessarily left without an owner after A.'s decease. If, therefore, A. should, at his decease, have a son who should then be twenty-four years of age or more, such son will at once take the feudal possession by reason of the estate in remainder which vested in him the moment he attained that age. In this case the contingent remainder has vested during the continuance of the particular estate. But if there should be no son,

(*t*) Stat. 10 & 11 Will. III. c. 16.

(*u*) *Doe v. Clarke*, 2 H. Bl. 399; *Blackburn v. Stables*, 2 Ves.

& Beames, 367; *Mogg v. Mogg*, 1 Meriv. 654; *Trower v. Butts*, 1 Sim. & Stu. 181.

(*x*) 2 Prest. Abst. 148.

or if the son should not have attained the prescribed age at his father's death, the remainder will fail altogether (y). For the feudal possession will then immediately on the father's decease, revert, for want of another owner, to the person who made the gift in right of his reversion. And, having once reverted, it cannot now belong to the son, without the grant to him of some fresh estate by means of some other conveyance. An Act of 1877 (z), however, now saves from the operation of this rule every contingent remainder, which has been created by any instrument executed or will republished on or after the 2nd of August, 1877, and which would have been valid, if originally created as a shifting use or executory devise. For such contingent remainders shall be capable of taking effect, notwithstanding that the particular estate determine before the contingent remainder vests. We will defer the explanation of the exact point of this enactment, until we have seen what limitations may take effect as shifting uses or executory devises

Exception made by Act of 1877.

A contingent remainder cannot be made to vest on any event which is illegal, or *contra bonos mores*. Accordingly no such remainder can be given to a child who may be hereafter born out of wedlock. But this can scarcely be said to be a rule for the creation of contingent remainders. It is rather a part of the general policy of the law in its discouragement of vice. In the reports of Lord Coke, however, a rule is laid down of

Events on which a contingent remainder may not vest.

(y) *Festing v. Allen*, 12 Mees. & Wels. 279; 5 Hare, 578. See however as to this case, *Kiley v. Garnett*, 3 De Gex and S. 629; *Browne v. Browne*, 3 Sma. & Giff. 568, qy? *Re Mid Kent Railway Act*, 1856, *Ex parte Sivan*, John. 387; *Holmes v. Prescott*, V.-C. W., 10 Jur. N. S. 507; 12 W. R. 686; *Rhodes v. Whitehead*, 2 Drew. &

Sm. 532; *Price v. Hall*, L. R., 5 Eq. 399; *Perceval v. Perceval*, L. R., 9 Eq. 386; *Re Eddel's Trust*, V.-C. B., L. R., 11 Eq. 559; *Brackenbury v. Gibbons*, 2 Ch. Div. 417; *Cunliffe v. Branker*, 3 Ch. Div. 393.
(z) Stat. 40 & 41 Vict. c. 38; as to which see Williams' on Seisin, Appx. B.

Possibility on
a possibility.

Scholastic
logic.

Examples of
common and
double possi-
bilities.

which it may be useful to take some notice, namely, that the event on which a remainder is to depend must be a common possibility, and not a double possibility, or a possibility *on* a possibility, which the law will not allow (a). This rule, though professed to be founded on former precedents, is not to be found in any of the cases to which Lord Coke refers, in none of which do either of the expressions "possibility on a possibility," or "double possibility," occur. It appears to owe its origin to the mischievous scholastic logic which was then rife in our courts of law, and of which Lord Coke had so high an opinion that he deemed a knowledge of it necessary to a complete lawyer (b). The doctrine is indeed expressly introduced on the authority of logic:—"as the logician saith, '*potentia est duplex, remota et propinqua*'" (c). This logic, so soon afterwards demolished by Lord Bacon, appears to have left behind it many traces of its existence in our law; and perhaps it would be found that some of these artificial and technical rules which have most annoyed the judges of modern times (d) owe their origin to this antiquated system of endless distinctions without solid differences. To show how little of practical benefit could ever be derived from the distinction between a common and a double possibility, let us take one of Lord Coke's examples of each. He tells us that the chance that a man and a woman, both married *to different persons*, shall themselves marry one another, is but a common possibility (e). But the chance that a married man shall have a son named Geoffrey is stated to be a double or remote possibility (f). Whereas it is evident that the latter event is at least quite as likely to happen as the former. And if the son were to get an estate from being named Geoffrey,

(a) 2 Rep. 51 a.; 10 Rep. 50 b.

(b) Preface to Co. Litt. p. 37.

(c) 2 Rep. 51 a.

(d) Such as the rule in *Dum-*

por's case, 4 Rep. 119.

(e) 10 Rep. 50 b.; Year Book, 15 Hen. VII. 10 b, pl. 16.

(f) 2 Rep. 51 b.

as in the case put, there can be very little doubt but that Geoffrey would be the name given to the first son who might be born (*g*). Respect to the memory of Lord Coke has long kept on foot in our law books (*h*) the rule that a possibility on a possibility is not allowed by law in the creation of contingent remainders. But the authority of this rule has long been declining (*i*), and a very learned judge, now deceased, declared plainly that it was abolished (*k*).

But although the doctrine of Lord Coke, that there can be no possibility on a possibility, has ceased to govern the creation of contingent remainders, there are yet rules by which these remainders are restrained within due bounds, and prevented from keeping the lands, which are subject to them, for too long a period beyond the reach of alienation. These rules are closely connected with the rule introduced to effect the same object in the case of executory interests. It will therefore be more convenient to postpone their consideration until some explanation of such interests has been given.

(*g*) The true ground of the decision in the old case (10 Edw. III. 45), to which Lord Coke refers, was no doubt, as suggested by Mr. Preston, 1 Prest. Abst. 123, that the gift was made to Geoffrey the son, as though he were living, when in fact there was then no such person. And see Gray, Rule against Perpetuities (Boston, 1886), 81—83.

(*h*) 2 Black. Comm. 170; Fearn, Cont. Rem. 252.

(*i*) See Third Report of Real Property Commissioners, p. 29; 1 Prest. Abst. 123, 129.

(*k*) Lord St. Leonards, in *Cole v. Sewell*, 2 Conn. & Laws. 844; 4 Dru. & Warr. 1, 32; affirmed, 2 H. L. C. 186. In *Re Frost*, 43 Ch. D. 246, 253, however, Lord Justice (then Mr. Justice) Kay

endeavoured to support his decision by an application of the rule against double possibilities in its native simplicity. But it is respectfully submitted that the language used in this case is open to the criticism applied by Mr. Butler (Fearn, C. R. 251 n., 9th ed.) to Lord Coke's remarks; and that the other ground, on which Lord Justice Kay founded his decision, is the sounder. The history of this supposed rule is admirably stated in Mr. J. C. Gray's Rule against Perpetuities (Boston, 1886), pp. 80—86, 135, 139, 140. It is there shown to be a conceit of Lord Chief Justice Popham's, which was repudiated by Lord Coke himself and by Lord Nottingham; see 1 Rolle Rep. 321; 3 Ch. Ca. 29.

The expectant owner of a contingent remainder may be now living. Though a contingent remainder is an estate which, if it arise, must arise at a future time, and will then belong to some future owner, yet the contingency may be of such a kind, that the future expectant owner may be now living.

Example. For instance, suppose that a conveyance be made to A. for his life, and if C. be living at his decease, then to B. and his heirs. Here is a contingent remainder, of which the future expectant owner may be now living. The estate of B. is not a present vested estate, kept out of possession only by A.'s prior right thereto. But it is a future estate not to commence, either in possession or in interest, till A.'s decease. It is not such an estate as, according to our definition of a vested remainder, is always ready to come into possession whenever A.'s estate may end; for, if A. should die after C., B. or his heirs can take nothing. Still B., though he has no estate during A.'s life, has yet plainly a chance of obtaining one, in case C. should survive. This chance in law is called a *possibility*;

A possibility.

A contingent remainder could not be conveyed by deed,

but might be released.

and a possibility of this kind was long looked upon in much the same light as a condition of re-entry was regarded (l), having been inalienable at law, and not to be conveyed to another by deed of grant. A fine alone, before fines were abolished, could effectually have barred a contingent remainder (m). It might, however, have been released; that is to say, B. might, by deed of release, have given up his interest for the benefit of the reversioner, in the same manner as if the contingent remainder to him and his heirs had never been limited (n); for the law, whilst it tolerated conditions of re-entry and contingent remainders, always gladly permitted such rights to be got rid of by release, for the sake of preserving unimpaired such vested estates as might happen

(l) *Ante*, p. 209.

(m) *Fearne, Cont. Rem.* 265; *Helps v. Hereford*, 2 Barn. & Ald. 242; *Doe d. Christmas v. Oliver*, 10 Barn. & Cress. 181; *Doe d.*

Lumley v. Earl of Scarborough, 3 Adol. & Ell. 2.

(n) *Lampel's case*, 10 Rep. 48 a, b; *Marks v. Marks*, 1 Strange, 132.

to be subsisting. A contingent remainder was also ^{Was devisable.} devisable by will under the old statutes (*o*), and is so under the present Wills Act (*p*). And it was the rule ^{Was assignable in equity.} in equity, that an assignment intended to be made of a possibility for a valuable consideration should be decreed to be carried into effect (*q*). But the Act to ^{Act to amend the law of real property.} amend the law of real property (*r*) now enacts, that a contingent interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed (*s*).

The circumstance of a contingent remainder having ^{Inalienable nature of a contingent remainder.} been so long inalienable at law was a curious relict of the ancient feudal system. This system, the fountain of our jurisprudence as to landed property, was strongly opposed to alienation. Its policy was to unite the lord and tenant by ties of mutual interest and affection; and nothing could so effectually defeat this end as a constant change in the parties sustaining that relation. The proper method, therefore, of explaining our laws, is not to set out with the notion that every subject of property may be aliened at pleasure; and then to endeavour to explain why certain kinds of property cannot be aliened, or can be aliened only in some modified manner. The law itself began in another way. When, and in what manner, different kinds of property gradually became subject to different modes of alienation is the matter to be explained; and this

(*o*) *Roe d. Perry v. Jones*, 1 H. Black. 80; *Fearne, Cont. Rem.* 368, note.

(*p*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 2; *Ingilby v. Amcotts*, 21 Beav. 585.

(*q*) *Fearne, Cont. Rem.* 550, 551; see, however, *Carlton v. Leighton*, 8 Meriv. 667, 668, note (*b*).

W.R.P.

(*r*) Stat. 8 & 9 Vict. c. 106, s. 6.

(*s*) Every such disposition, if made by a married woman, was required to be made conformably to the provisions of the Act for the abolition of fines and recoveries; *ante*, p. 284. See now *Re Drummond and Davies' Contract*, 1891, 1 Ch. 524.

explanation we have endeavoured, in proceeding, as far as possible to give. But, as to such interests as remained inalienable, the reason of their being so was, that they had not been altered, but remained as they were. The statute of *Quia emptores* (t) expressly permitted the alienation of lands and tenements,—an alienation which usage had already authorized; and ever since this statute, the ownership of an *estate* in lands (an estate tail excepted) has involved in it an undoubted power of conferring on another person the same, or, perhaps more strictly, a similar estate. But a contingent remainder is no estate: it is merely a chance of having one; and the reason why it so long remained inalienable at law was simply because it had never been thought worth while to make it alienable.

Destruction
of contingent
remainders.

Liability to
destruction
now removed.

Example.

One of the most remarkable incidents of a contingent remainder was its liability to destruction, by the sudden determination of the particular estate upon which it depended. This liability was removed by the Act to amend the law of real property (u): it was, in effect, no more than a strict application of the general rule, required to be observed in the creation of contingent remainders, that the freehold must never be left without an owner. For if, after the determination of the particular estate, the contingent remainder might still, at some future time, have become a vested estate, the freehold would, until such time, have remained undisposed of, contrary to the principles of the law before explained (x). Thus, suppose lands to have been given to A., a bachelor, for his life, and after his decease to his eldest son and the heirs of his body, and, in default of such issue, to B. and his heirs. In this case A. would

(t) 18 Edw. I. c. 1, *ante*, p. 69.

(u) Stat. 8 & 9 Vict. c. 106, s. 8, repealing stat. 7 & 8 Vict.

c. 76, s. 8, to the same effect.

(x) *Ante*, p. 331.

have had a vested estate for his life in possession. There would have been a contingent remainder in tail to his eldest son, which would have become a vested estate tail in such son the moment he was born, or rather begotten; and B. would have had a vested estate in fee simple in remainder. Now suppose that, before A. had any son, the particular estate for life belonging to A., which supported the contingent remainder to his eldest son, should suddenly have determined during A.'s life, B.'s estate would then have become an estate in fee simple in possession. There must be some owner of the freehold; and B., being next entitled, would have taken possession. When his estate once became an estate in possession, the prior remainder to the eldest son of A. was for ever excluded. For, by the terms of the gift, if the estate of the eldest son was to come into possession at all, it must have come in before the estate of B. A forfeiture by A. of his life estate, before the birth of a son, would therefore at once have destroyed the contingent remainder by letting into possession the subsequent estate of B. (y).

Forfeiture of life estate.

The determination of the estate of A. was, however, in order to effect the destruction of the contingent remainder, required to be such a determination as would put an end to his right to the freehold or feudal possession. Thus, if A. had been forcibly ejected from the lands, his right of entry would still have been sufficient to preserve the contingent remainder; and, if he should have died whilst so out of possession, the contingent remainder might still have taken effect. For, so long as A.'s feudal possession, or his right thereto, continues, so long, in the eye of the law, does his estate last (z).

A right of entry would have supported a contingent remainder.

(y) Fearn, Cont. Rem. 817; Bing. N. C. 609.
see *Doe d. Davies v. Gatacre*, 5 (s) Fearn, Cont. Rem. 286.

Merger.

It is a rule of law, that "whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned in the greater" (a). From the operation of this rule, an estate tail is preserved by the effect of the statute *De donis* (b). Thus, the same person may have, at the same time, an estate tail, and also the immediate remainder or reversion in fee simple expectant on the determination of such estate tail by failure of his own issue. But with regard to other estates, the larger will swallow up the smaller; and the intervention of a contingent remainder which, while contingent, is not an estate, will not prevent the application of the rule. Accordingly, if in the case above given A. should have purchased B.'s remainder in fee, and should have obtained a conveyance of it to himself, before the birth of a son, the contingent remainder to his son would have been destroyed. For in such a case, A. would have had an estate for his own life, and also, by his purchase, an immediate vested estate in fee simple in remainder expectant on his own decease; there being, therefore, no vested estate intervening, a merger would have taken place of the life estate in the remainder in fee. The possession of the estate in fee simple would have been accelerated and would have immediately taken place, and thus a destruction would have been effected of the contingent remainder (c), which could never afterwards have become a vested estate; for, were it to have become vested, it must have taken possession subsequently to the remainder in fee simple; but this it could not do, both by the terms of the gift, and also by the very nature of a remainder in fee simple, which can never have a remainder after it. In the same manner

(a) 2 Black. Comm. 177.

(b) Stat. 13 Edw. I. c. 1; *ante*,

p. 88.

(c) Fearn, Cont. Rem. 340.

the sale by A. to B. of the life estate of A., called in law a *surrender* of the life estate, before the birth of a son, would have accelerated the possession of the remainder in fee simple by giving to B. an uninterrupted estate in fee simple in possession; and the contingent remainder would consequently have been destroyed (*d*). The same effect would have been produced by A. and B. both conveying their estates to a third person, C., before the birth of a son of A. The only estates then existing in the land would have been the life estate of A. and the remainder in fee of B. C., therefore, by acquiring both these estates, would have obtained an estate in fee simple in possession; on which no remainder could depend (*e*). But the Act to amend the law of real property (*f*) altered the law in all these cases; for, whilst the principles of law on which they proceeded were not expressly abolished, it was nevertheless enacted (*g*), that a contingent remainder shall be, and if created before the passing of the Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened. This Act, it will be observed, applies only to the three cases of forfeiture, surrender or merger of the particular estate. If, at the time when the particular estate would naturally have expired, the contingent remainder be not ready to come into immediate possession, it will still fail as before (*h*), except in the cases provided for by the Act of 1877 to amend the law as to contingent remainders (*i*).

Surrender of
the life estate.

Act to amend
the law of real
property.

(*d*) Fearn, Cont. Rem. 318.

(*e*) Fearn, Cont. Rem. 322,
note; *Noel v. Bowley*, 3 Sim. 108;
Egerton v. Massey, 3 C. B., N. S.
338.

(*f*) Stat. 8 & 9 Vict. c. 106,
repealing stat. 7 & 8 Vict. c. 76,

s. 8, to the same effect.

(*g*) Sect. 8.

(*h*) *Price v. Hall*, L. R., 5 Eq.
399; *Perceval v. Perceval*, L. R.,
9 Eq. 386.

(*i*) Stat. 40 & 41 Vict. c. 38,
ante, p. 333.

Trustees to
preserve
contingent
remainders.

The disastrous consequences which would have resulted from the destruction of the contingent remainder, in such a case as that we have just given, were obviated in practice by means of the interposition of a vested estate between the estates of A. and B. We have seen (*k*) that an estate for the life of A., to take effect in possession after the determination, by forfeiture or otherwise, of A.'s life interest, is not a contingent, but a vested estate in remainder. It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. The plan, therefore, adopted for the preservation of contingent remainders to the children of a tenant for life was to give an estate, after the determination by any means of the tenant's life interest, to certain persons and their heirs during his life, as trustees for preserving the contingent remainders; for which purpose they were to enter on the premises, should occasion require; but should such entry be necessary, they were nevertheless to permit the tenant for life to receive the rents and profits during the rest of his life. These trustees were prevented by the Court of Chancery from parting with their estate, or in any way aiding the destruction of the contingent remainders which their estate supported (*l*). And, so long as their estate continued, it is evident that there existed, prior to the birth of any son, three vested estates in the land; namely, the estate of A. the tenant for life, the estate in remainder of the trustees during his life, and the estate in fee simple in remainder, belonging, in the case we have supposed, to B. and his heirs. This vested estate of the trustees, interposed between the estates of A. and B., prevented their union, and consequently prevented the remainder in fee simple from ever coming into possession, so long as the estate of the trustees

(*k*) *Ante*, p. 329.

(*l*) *Fearne, Cont. Rem.* 326.

endured, that is, if they were faithful to their trust, so long as A. lived. Provision was thus made for the keeping up of the feudal possession until a son was born to take it; and the destruction of the contingent remainder in his favour was accordingly prevented. But now that contingent remainders can no longer be destroyed, of course there is no occasion for trustees to preserve them (*m*).

In a former part of this volume we have spoken of Trust estates. equitable or trust estates (*n*). In these cases the whole estate at law belongs to trustees, who are accountable in equity to their cestui que trusts, the beneficial owners. As equity follows the law in the limitation of its estates, so it permits an equitable or trust estate to be disposed of by way of particular estate and

(*m*) The following extract from a modern settlement, of a date previous to 1846, will explain the plan which used to be adopted. The lands were conveyed to the trustees and their heirs, to the uses declared by the settlement; by which conveyance the trustees took no permanent estate at all, as has been explained (*ante*, p. 166), but the seisin was at once transferred to those to whose use estates were limited. Some of these estates were as follows:—

* "To the use of the said A. and his assigns for and during the term of his natural life without impeachment of waste and from and immediately after the determination of that estate by forfeiture or otherwise in the lifetime of the said A. + To the use of the said (*trustees*) their heirs and assigns during the life of the said A. In trust to preserve the contingent uses and estates hereinafter limited from being defeated or destroyed and for that purpose to make entries and bring actions as occasion may require. But nevertheless

"to permit the said A. and his assigns to receive the rents issues and profits of the said lands hereditaments and premises during his life. And from and immediately after the decease of the said A. To the use of To A.'s first the first son of the said A. and other of the heirs of the body of such sons in tail. first son lawfully issuing and in default of such issue. To the use of the second third fourth fifth and all and every other son and sons of the said A. severally successively and in remainder. To A. for der one after another as they life. shall be in seniority of age and priority of birth and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing the elder of such sons + To trustees and the heirs of his body issuing during his being always to be preferred to life to preserve and to take before the younger contingent of such sons and the heirs of his remainders. and their body and respective bodies issuing. And in default of such issue" &c. Then follow the other remainders.

(*n*) *Ante*, p. 169 *et seq.*

Contingent remainders of trust estates were indestructible.

remainder, in the same manner as an estate at law. Contingent remainders may also be limited of trust estates. But between such contingent remainders, and contingent remainders of estates at law, there was always this difference, that whilst the latter were destructible, the former were not (o). The destruction of a contingent remainder of an estate at law depended, as we have seen, on the ancient feudal rule, which required a continuous and ascertained possession of every piece of land to be vested in some freeholder. But in the case of trust estates, the feudal possession remains with the trustee (p). And, as the destruction of contingent remainders at law defeated, when it happened, the intention of those who created them, equity did not so far follow the law as to introduce into its system a similar destruction of contingent remainders of trust estates. It rather compelled the trustees continually to observe the intention of those whose wishes they had undertaken to execute. Accordingly, if a conveyance had been made unto *and to the use of* A. and his heirs, in trust for B. for life, and after his decease in trust for his first and other sons successively in tail,—here the whole legal estate would have been vested in A., and no act that B. could have done, nor any event which might have happened to his equitable estate, before its natural termination, could have destroyed the contingent remainder directed to be held by A. or his heirs in trust for the eldest son.

(o) *Fearne, Cont. Rem.* 321.

(p) See *Chapman v. Blissett*, *Cas. Temp.* Talbot, 145, 151; *Hopkins v. Hopkins*, *Cas. Temp.* Talbot, 52 n.; *Asley v. Mickelthwait*, 15 Ch. D. 59; *Abbie v. Burney*, 17 Ch. D. 211.

CHAPTER III.

OF AN EXECUTORY INTEREST.

CONTINGENT remainders are future estates, which, as we have seen (*a*), were continually liable, at common law, until they actually existed *as estates*, to be destroyed altogether; executory interests, on the other hand, are future estates, which in their nature are indestructible (*b*). They arise, when their time comes, ^{Executory interests arise of their own strength.} as of their own inherent strength; they depend not for protection on any prior estates, but on the contrary, they themselves often put an end to any prior estates, which may be subsisting. It is proposed, in the present chapter, to consider the means by which these future estates may be created; and, in the next, to treat of the time fixed by the law, within which they must arise, and beyond which they cannot be made to commence. We shall then be enabled to revert to the rules, which prevent the settlement of property in perpetuity by a series of contingent remainders.

1. Executory interests may now be created in two ways—under the Statute of Uses (*c*), and by will. Executory interests created under the Statute of Uses are called

(a) *Ante*, p. 388 *et seq.*

(b) *Fearne, Cont. Rem.* 418. Before fines were abolished, it was a matter of doubt whether a fine would not bar an executory interest, in case of non-claim for five years after a right of entry had arisen under the executory interest. *Romilly v. James*, 6

Taunt. 263; see *ante*, pp. 68, n., 94. Executory interests subsequent to, or in defeazance of an estate tail, may also be barred in the same manner, and by the same means, as remainders expectant on the determination of the estate tail. *Fearne, Cont. Rem.* 428.

(c) *Stat. 27 Hen. VIII. c. 10.*

Springing
and shifting
uses.

Executory
uses anciently
allowed by
the Court of
Chancery.

The Statute
of Uses.

Executory
uses still
allowed.

springing or shifting uses. We have seen (*d*) that, previously to the passing of this statute, the *use* of land was under the sole jurisdiction of the Court of Chancery, as trusts were afterwards. In the exercise of this jurisdiction it would seem that the Court of Chancery, rather than disappoint the intentions of parties, gave validity to such interests of a future or executory nature, as were occasionally created in the disposition of the use (*e*). For instance, if a feoffment had been made to A. and his heirs, to the use of B. and his heirs from to-morrow, the Court would, it seems, have enforced the use in favour of B. notwithstanding that, by the rules of law, the estate of B. would have been void (*f*). Here we have an instance of an executory interest in the shape of a springing use, giving to B. a future estate arising on the morrow of its own strength, depending on no prior estate, and therefore not liable to be destroyed by its prop falling. When the Statute of Uses (*g*) was passed, the jurisdiction of the Court of Chancery over uses was at once annihilated. But uses in becoming, by virtue of the statute, estates at law, brought with them into the courts of law many of the attributes, which they had before possessed while subjects of the Court of Chancery. Amongst others which remained untouched, was this capability of being disposed of in such a way as to create executory interests. The legal seisin or possession of lands became then, for the first time, disposable without the observance of the formalities previously required (*h*); and, amongst the dispositions allowed, were these executory interests, in which the legal seisin is shifted about from one person to another, at the mercy of the springing uses, to which the seisin has been indissolubly united by the Act of Parliament :

(*d*) *Ante*, pp. 161, 163.

(*e*) Butl. n. (*a*) to Fearn, Cont.

Rem. 884.

(*f*) *Ante*, p. 381.

(*g*) 27 Hen. VIII. c. 10, *ante*, p. 164.

(*h*) See *ante*, pp. 166, 188—192.

accordingly it now happens that by means of uses, the legal seisin or possession of lands may be shifted from one person to another in an endless variety of ways. We have seen (i), that a conveyance to B. and his heirs to hold from to-morrow is absolutely void. But by means of shifting uses, the desired result may be accomplished; for, an estate may be conveyed to A. and his heirs, to the use of the conveying party and his heirs until to-morrow, and then to the use of B. and his heirs.

A very common instance of such a shifting use occurs in an ordinary marriage settlement of lands. Supposing A. to be the settlor, the lands are then conveyed by him, by a settlement executed a day or two before the marriage, to the trustees (say B. and C. and their heirs) Example:—
To the use of
A. and his
heirs until a
marriage, and
after the
marriage, to
other uses.

“to the use of A. and his heirs until the intended marriage shall be solemnized, and from and immediately after the solemnization thereof,” to the uses agreed on; for example to the use of D., the intended husband, and his assigns for his life, and so on. Here B. and C. take no permanent estate at all, as we have already seen (k). A. continues as he was, a tenant in fee simple until the marriage; and, if the marriage should never happen, his estate in fee simple will continue with him untouched. But, the moment the marriage takes place,—without any further thought or care of the parties,—the seisin or possession of the lands shifts away from A. to vest in D., the intended husband, for his life according to the disposition made by the settlement. After the execution of the settlement, and until the marriage takes place, the interest of all the parties, except the settlor, is future, and contingent also on the event of the marriage. But the life estate of D., the intended husband, is not an interest of the kind called a contingent remainder. For, the estate which precedes it, namely, that of A., is an estate in fee simple, after which no remainder can be

(i) *Ante*, p. 331

(k) *Ante*, pp. 166, 194—196.

Another
instance.

Name and
arms.

limited. The use to D. for his life springs up on the marriage taking place, and puts an end at once and for ever to the estate in fee simple which belonged to A. Here, then, is the destruction of one estate, and the substitution of another. The possession of A. is wrested from him by the use to D., instead of D.'s estate waiting till A.'s possession is over, as it must have done had it been merely a remainder. Another instance of the application of a shifting use occurs in those cases in which it is wished that any person who shall become entitled under the settlement should take the name and arms of the settlor. In such a case, the intention of the settlor is enforced by means of a shifting clause, under which, if the party for the time being entitled should refuse or neglect, within a definite time, to assume the name and bear the arms, the lands will shift away from him, and vest in the person next entitled in remainder.

From the above examples, an idea may be formed of the shifts and devices which can now be effected in settlements of land, by means of springing and shifting uses. By means of a use, a future estate may be made to spring up with certainty at a given time. It may be thought, therefore, that contingent remainders, having until recently been destructible, would never have been made use of in modern conveyancing, but that every thing would have been made to assume the shape of an executory interest. This, however, is not the case. For, in many instances, future estates are necessarily required to wait for the regular expiration of those which precede them; and, when this is the case, no art or device can prevent such estates from being what they are, contingent remainders. The only thing that could formerly be done, was to take care for their preservation, by means of trustees for that purpose. For, the law, having been acquainted with remainders

long before uses were introduced into it, will never construe any limitation to be a springing or shifting use, which, by any fair interpretation, can be regarded as a remainder, whether vested or contingent (l).

No limitation construed as a shifting use which can be regarded as a remainder.

The establishment of shifting and contingent uses occasioned great difficulties to the early lawyers, in consequence of the supposed necessity that there should, at the time of the happening of the contingency on which the use was to shift, be some person seised to the use then intended to take effect. If a conveyance were made to B. and his heirs, to the use of A. and his heirs until a marriage or other event, and afterwards to the use of C. and his heirs, it was said that the use was executed in A. and his heirs by the statute, and that as this use was co-extensive with the seisin of B., B. could have no actual seisin remaining in him. The event now happens. Who is seised to the use of C.? In answer to this question it was held that the original seisin reverts back to B., and that on the event happening he becomes seised to the use of C. And to support this doctrine it was further held that meantime a possibility of seisin, or *scintilla juris*, remained vested in B. But this doctrine, though strenuously maintained in theory, was never attended to in practice. And in modern times the opinion contended for by Lord St. Leonards was generally adopted, that in fact no *scintilla* whatever remained in B., but that he was, by force of the statute, immediately divested of all estate, and that the uses thenceforward took effect as legal estates according to their limitations, by relation to the original seisin momentarily vested in B. (m). Finally, an Act of 1860 declared the law to be in

Now abolished.

(l) Fearn, Cont. Rem. 886—*mere and Lloyd*, 18 Ch. D. 524; 895, 528; *Doe d. Harris v. Howell*, 10 Barn. & Cress. 191, 197; 1 *Dean v. Dean*, 1891, 3 Ch. 150. Prest. Abst. 180. See *Re Leach* (m) Sugd. Pow. 19, 8th ed.

accordance with Lord St. Leonards's opinion, and gravely abolished the existence of *scintilla juris* (n).

Powers.

One of the most convenient and useful applications of springing uses occurs in the case of *powers*, which are methods of causing a use, with its accompanying estate, to spring up at the will of any given person (o):—Thus, lands may be conveyed to A. and his heirs to such uses as B. shall, by any deed or by his will, appoint, and in default of and until any such appointment, to the use of C. and his heirs, or to any other uses. These uses will accordingly confer vested estates on C., or the parties having them, subject to be divested or destroyed at any time by B.'s exercising his *power* of appointment. Here B., though not owner of the property, has yet the power at any time, at once to dispose of it, by executing a deed; and if he should please to appoint it to the use of himself and his heirs, he is at perfect liberty so to do; or, by virtue of his power, he may dispose of it by his will. Such a power of appointment is evidently a privilege of great value; it is nearly as good as ownership; and it has, accordingly, been made to share the liabilities of ownership. Thus, under the Act of 1838 extending creditors' remedies, the sheriff may deliver execution under the writ of *elegit* of all hereditaments, over which a judgment debtor shall at the time of the judgment, or at any time afterwards, have any disposing power which

Creditors' rights.

(n) Stat. 23 & 24 Vict. c. 88, s. 7, which provides that where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise, by force of and by relation to the estate and seisin origi-

nally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be deemed necessary for the support of, or to give effect to, future or contingent or executory uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere.

(o) See Co. Litt. 271 b, n. (1), VII., 1.

he might, without the assent of any other person, exercise for his own benefit (*p*). And by the Bank-Bankruptcy. ruptcy Act, 1883, the trustee for the creditors of any person becoming bankrupt may exercise, for the benefit of his creditors, all powers (except the right of nomination to a vacant ecclesiastical benefice) which might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge (*q*). So that, in the example we have taken, the estate of C. is liable to be defeated by any judgment creditor of B. taking the lands in execution, or in the event of B.'s bankruptcy, as well as by an appointment made by B. But if B. should die before the lands have been affected by any judgment against him (*r*), and without having been bankrupt, or having made any appointment by deed or will, C. will become indefeasibly entitled to the lands; which will be no longer subject to B.'s debts (*s*). If, however, B. should exercise the power by deed or will in favour of a volunteer (or person not claiming for valuable consideration (*t*)), he will be considered to have made the lands his own; and they will therefore be liable to satisfy all his debts after his death, but not until all his other property has been exhausted (*u*).

Suppose, then, that B. should exercise his power, Exercise of and appoint the lands by deed, to the use of D. and his power by deed.

(*p*) Stat. 1 & 2 Vict. c. 110, s. 11; *ante*, p. 246. By sect. 13, judgments were also made a charge on such hereditaments: but the effect of the Act in this respect was modified by later Acts of 1860, 1864 and 1888, in the manner explained in the chapter on Creditors' Rights; *ante*, pp. 248—251.

(*q*) Stat. 46 & 47 Vict. c. 52, ss. 44, 56; see Williams on Personal Property, 196, 202, 203, 207, 18th ed.; *Nichols to Macey*, 29

Ch. D. 1005. Stat. 32 & 33 Vict. c. 71, ss. 15, par. (4), 25, par. (5), were to the same effect. The former Acts gave a similar power to the assignees of the bankrupt; see stats. 6 Geo. IV. c. 16, s. 77; 12 & 13 Vict. c. 106, s. 147.

(*r*) See *ante*, pp. 246—251.

(*s*) *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206.

(*t*) *Ante*, p. 74.

(*u*) Sug. Pow. 474, 8th ed. *Fleming v. Buchanan*, 3 De G. M. & G. 976.

The power is only over the use.

heirs. In this case, the execution by B. of the instrument required by the power, is the event on which the use is to spring up, and to destroy the estate already existing. The moment, therefore, that B. has duly executed his power of appointment over the use in favour of D. and his heirs, D. has an estate in fee simple in possession vested in him, by virtue of the Statute of Uses, in respect of the *use* so appointed in his favour; and the previously existing estate of C. is thenceforth completely at an end. The power of disposition exercised by B. extends, it will be observed, only to the use of the lands; and the fee simple is vested in the appointee, solely by virtue of the operation of the Statute of Uses, which always instantly annexes the legal estate to the use (*v*). If, therefore, B. were to make an appointment of the lands, in pursuance of his power, to D. and his heirs, *to the use of E. and his heirs*, D. would still have the use, which is all that B. has to dispose of; and the use to E. would be a use upon a use, which, as we have seen (*w*), is not executed, or made into a legal estate by the Statute of Uses. E., therefore, would obtain no estate at law: although the Court would, in accordance with the expressed intention, consider him beneficially entitled, and would treat him as the owner of an equitable estate in fee simple, obliging D. to hold his legal estate merely as a trustee for E. and his heirs.

The terms and formalities of the power must be complied with.

In the exercise of a power it is absolutely necessary that the terms of the power, and all the formalities required by it, should be strictly complied with. If the power should require a *deed* only, a *will* will not do; or, if a *will* only, then it cannot be exercised by a *deed* (*x*), or by any other act, to take effect in the life-

(*v*) See *ante*, pp. 164—166.
(*w*) *Ante*, p. 167.

(*z*) *Marjoribanks v. Hovenden*,
1 Drury, 11.

time of the person exercising the power (y). So, if the power is to be exercised by a deed attested by *two* witnesses, then a deed attested by *one* witness only will be insufficient (z). This strict compliance with the terms of the power was carried to a great length by the Courts of law; so much so that where a power was required to be exercised by a writing *under hand and seal attested by witnesses*, the exercise of the power was held to be invalid if the witnesses did not sign a written attestation of the signature of the deed, as well as of the sealing (a). The decision of this point was rather a surprise upon the profession, who had been accustomed to attest deeds by an indorsement, in the words "sealed and delivered by the within-named B. in the presence of," instead of wording the attestation, as in such a case this decision required, "*Signed, sealed, and delivered,*" &c. In order, therefore, to render valid the many deeds which by this decision were rendered nugatory, an Act of Parliament (b) was passed by which the defect thus arising was cured, as to all deeds and instruments, intended to exercise powers, which were executed prior to the 30th of July, 1814, the day of the passing of the Act. But as the Act had no prospective operation, the words "*signed, sealed and delivered*" were still necessary to be used in the attestation, in all cases where the power was to be exercised by writing *under hand and seal, attested by witnesses* (c). It is, however, now provided by an

Power to be exercised by writing under hand and seal, attested by witnesses.

Stat. 54 Geo. III. c. 168.

(y) Sugd. Pow. 210, 8th ed.; 1 Chance on Powers, ch. 9, pp. 273 et seq.

(z) Sugd. Pow. 207 et seq., 8th ed.; 1 Chance on Powers, 881.

(a) *Wright v. Wakeford*, 4 Taunt. 213; *Doe d. Mansfield v. Peach*, 2 Mau. & Selw. 576; *Wright v. Barlow*, 3 Mau. & Selw. 512.

(b) 54 Geo. III. c. 168.

(c) See, however, *Vincent v.*

Bishop of Sodor and Man, 5 Ex. Rep. 682, 693, in which case the Court of Exchequer intimated that they considered the case of *Wright v. Wakeford* now overruled by the case of *Burdett v. Doe d. Spilsbury*, 10 Clark & Fin. 840; 6 Mun. & Gran. 886. See also *Re Rickett's Trusts*, 1 John. & H. 70, 72, affirmed in H. of L. as *Newton v. Ricketts*, 9 H. of L. Cas. 262.

New enactment.

Act of 1859, that a deed thereafter executed in the presence of and attested by *two or more* witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary; notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation, or solemnity. Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed, in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing contained in the Act shall prevent the donee of a power from executing it conformably to the power by writing, or otherwise than by an instrument executed and attested as an ordinary deed; and to any such execution of a power this provision shall not extend (*d*).

Equitable relief on the defective execution of powers.

This strict construction adopted by the Courts of law, in the case of instruments exercising powers, is in some degree counterbalanced by the practice which prevailed in the Court of Chancery to give relief in certain cases, when a power had been defectively exercised,—a relief still afforded by the High Court of Justice, now that the Court of Chancery has been abolished. If the Courts of law have gone to the very limit of strictness, for the benefit of the persons entitled in default of appointment, the Court of Chancery, on the other hand, appears to have overstepped the proper boundaries of

(*d*) Stat. 22 & 23 Vict. c. 35, s. 12; passed 18th Aug., 1859.

its jurisdiction in favour of the appointee (*e*). For, if the intended appointee be a purchaser from the person intending to exercise the power, or a creditor of such person, or his wife, or his child, or if the appointment be for a charitable purpose,—in any of these cases, equity will aid the defective execution of the power (*f*); in other words, the Court will compel the person in possession of the estate, and who was to hold it until the power was duly exercised, to give it up on an undue execution of such power. It is certainly hard that, for want of a little caution, a purchaser should lose his purchase or a creditor his security, or that a wife or child should be unprovided for; but it may well be doubted whether it be truly equitable, for their sakes, to deprive the person in possession; for the lands were originally given to him to hold until the happening of an event (the execution of the power), which, if the power be *not* duly executed, has in fact never taken place.

The above remarks equally apply to the exercise of a power by will. Formerly, every execution of a power to appoint by will was obliged to be effected by a will conformed, in the number of its witnesses and other circumstances of its execution, to the requisitions of the power. But the Wills Act of 1837 (*g*) requires that all wills should be executed and attested in the same uniform way (*h*); and it accordingly enacts (*i*), that no appointment made by will in exercise of any power shall be valid, unless the same be executed in the manner required by the Act: and that every will executed in the manner thereby required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have

(*e*) See 7 Ves. 506; Sugd. Pow. 532 *et seq.*, 8th ed.
 (*f*) Sugd. Pow. 534, 535, 8th ed.; 2 Chance on Powers, c. 23, p. 488 *et seq.*; *Lucena v. Lucena*,

5 Beav. 249.

(*g*) 7 Will. IV. & 1 Vict. c. 26.

(*h*) See *ante*, p. 223.

(*i*) Sect. 10.

been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Powers of alienation unconnected with ownership differ from alienation in respect of ownership.

These powers of appointment, viewed in regard to the individuals who are to exercise them, are a species of dominion over property, quite distinct from that free right of alienation which has now become inseparably annexed to every estate, except an estate tail, to which a modified right of alienation only belongs. As alienation by means of powers of appointment was of a less ancient date than the right of alienation annexed to ownership, so it was free from some of the incumbrances by which that right was clogged. Thus a man might exercise a power of appointment in favour of himself or of his wife (*j*); although, as we have seen (*k*), a man cannot, by virtue of his ownership, directly convey to himself, and could not, previously to the year 1882, so convey to his wife. So we have seen (*l*) that a married woman could not formerly convey her estates without a *fine*, levied by her husband and herself, in which she was separately examined; and afterwards, no conveyance of her estates could be made without a deed in which her husband must have concurred, and which must have been separately acknowledged by her to be her own act and deed. But a power of appointment either by deed or will might be given to any woman; and, whether given to her when married or when single, she might exercise such a power without the consent of any husband to whom she might then or thereafter be married (*m*); and the power might be exercised in favour of her husband, or of any one else (*n*). The Act of Parliament to which we have before referred (*o*), for enabling infants to make binding

Appointments between husband and wife.

Married woman might exercise powers.

Infants' marriage settlements.

(*j*) Sugd. Pow. 471, 8th ed.

(*k*) *Anie*, pp. 195, 286.

(*l*) *Anie*, pp. 283—286.

(*m*) *Doe* d. *Blomfield* v. *Eyre*,

8 C. B. 577; 5 C. B. 713.

(*n*) Sugd. Pow. 471, 8th ed.

(*o*) *Anie*, p. 271.

settlements on their marriage, with the sanction of the Court of Chancery, extends to property over which the infant has any power of appointment, unless it be expressly declared that the power shall not be exercised by an infant (*p*). But the Act provides, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any *infant tenant in tail* under the Act, and such *Sic.* infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void (*q*).

The power to dispose of property independently of any ownership, though established for some three centuries, is at the present day frequently unknown to those to whom such a power may belong. This ignorance has often given rise to difficulties and the disappointment of intention in consequence of the execution of powers by instruments of an informal nature, particularly by wills, too often drawn by the parties themselves. A testator would, in general terms, give all his estate or all his property; and because over some of it he had only a power of appointment, and not any actual ownership, his intention, till lately, was defeated. For such a general devise was no execution of his power of appointment, but operated only on the property that was his own. He ought to have given not only all that he had, but also all of which he had any power to dispose. The Wills Act of 1837 (*r*) provided a remedy for such cases, by enacting (*s*) that a general devise of the real estate of a testator shall be construed to include any real estate which he may have power to appoint in any

Ignorance of the nature of powers has caused disappointment of intention.

A general power of appointment now executed by a general devise.

(*p*) Stat. 18 & 19 Vict. c. 48, s. 1. See *Re Cardrose's Settlement*, 7 Ch. D. 728.

(*q*) Sect. 2. It has been held that appointments made under the Act by infants, who are not

tenants in tail, do not become void on their death under age; *Re Scott*, 1891, 1 Ch. 298.

(*r*) Stat. 7 Will. IV. & 1 Vict. c. 26.

(*s*) Sect. 27.

manner he may think proper (t), and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A power may exist concurrently with ownership.

A power may be extinguished or suspended by a conveyance of the estate.

A power of appointment may sometimes belong to a person concurrently with the ordinary power of alienation arising from the ownership of an estate in the lands. Thus lands may be limited to such uses as A. shall appoint, and in default of and until appointment to the use of A. and his heirs (u). And in such a case A. may dispose of the lands either by exercise of his power (x), or by conveyance of his estate (y). If he exercises his power the estate limited to him in default of appointment is thenceforth defeated and destroyed; and, on the other hand, if he conveys his estate, his power is thenceforward *extinguished*, and cannot be exercised by him in derogation of his own conveyance. So if, instead of conveying his own estate, he should convey only a partial interest, his power would be *suspended* as to such interest, although in other respects it would remain in force; that is, he may still exercise his power, so only that he do not defeat his own grant. When the same object may be accomplished either by an exercise of the power, or by a conveyance of the estate, care should be taken to express clearly by which of the two methods the instrument employed is intended to operate. Under such circumstances it is very useful first to exercise the power, and afterwards to convey the estate *by way of further assurance only*; in which case, if the power is valid and subsisting, the subsequent conveyance is of course inoperative (z);

(t) *Cloves v. Aubry*, 12 Beav. 604; *Re Mills*, 84 Ch. D. 186; *Re Williams*, 42 Ch. D. 98; *Re Byron's Settlement*, 1891, 3 Ch. 474.

(u) *Sir Edward Cless's case*, 6 Rep. 17 b; *Maundrell v. Maundrell*, 10 Ves. 248.

(x) *Roach v. Wadham*, 6 East,

289.

(y) *Cox v. Chamberlain*, 4 Ves. 681; *Wynne v. Griffith*, 3 Bing. 179; 10 J. B. Moore, 592; 5 B. & Cress. 928; 1 Russ. 288.

(z) *Ray v. Pung*, 5 Mad. 310; 5 B. & Ald. 561; *Doe d. Wigan v. Jones*, 10 B. & Cress. 459.

but if the power should by any means have been suspended or extinguished, then the conveyance takes effect.

The doctrine of powers, together with that of vested remainders, was brought into very frequent operation by the usual form of modern purchase deeds, whenever the purchaser was married on or before the first of January, 1834, or whenever, as sometimes happened, it was wished to render unnecessary any evidence that he was not so married. We have seen (*a*) that the dower of such women as were married on or before the first day of January, 1834, remained subject to the ancient law; and the inconvenience of taking a conveyance to the purchaser jointly with a trustee, for the purpose of barring dower, has also been pointed out (*b*). The modern method of effecting this object, and at the same time of conferring on the purchaser full power of disposition over the land, without the concurrence of any other person, was as follows: A general power of appointment by deed was in the first place given to the purchaser, by means of which he was entitled to dispose of the lands for any estate at any time during his life. In default of and until appointment, the land was then given to the purchaser for his life, and, after the determination of his life interest by any means in his lifetime, a remainder (which, as we have seen (*c*), was vested) was limited to a trustee and his heirs during the purchaser's life. This remainder was then followed by an ultimate remainder to the heirs and assigns of the purchaser for ever, or, which is the same thing, to the purchaser, his heirs and assigns for ever (*d*). These limitations were sufficient to prevent the wife's right of dower from attaching. For the purchaser had not, at

(*a*) *Ante*, p. 295.

(*b*) *Ante*, p. 297.

(*c*) *Ante*, pp. 329, 342.

(*d*) *Fearne, Cont. Rem.* 347, n.;
Co. Litt. 379 b, n. (1).

Uses to bar
dower.

any time during his life, an estate of inheritance in possession, out of which estate only a wife could claim dower (*e*): he had during his life only a life interest, together with a remainder in fee simple expectant on his own decease. The intermediate vested estate of the trustee prevented, during the whole of the purchaser's lifetime, any union of this life estate and remainder (*f*). The limitation to the heirs of the purchaser gave him, according to the rule in Shelley's case (*g*), all the powers of disposition incident to ownership: though subject, as we have seen (*h*), to the estate intervening between the limitation to the purchaser and that to his heirs. But the estate in the trustee lasted only during the purchaser's life, and during his life might at any time be defeated by an exercise of his power. A form of these *uses to bar dower*, as they were called, will be found in the Appendix (*i*). They will not bar the dower of wives married after the 1st of January, 1834; to whom dower is expressly given by the Dower Act (*k*) out of any estate of their husbands which, whether wholly equitable, or partly legal and partly equitable, is or is equal to an estate of inheritance in possession (*l*).

Special
powers

Besides these general powers of appointment, there exist also powers of a special kind. Thus the *estate* which is to arise on the exercise of the power of appointment may be of a certain limited duration and nature: of this an example occurs in the power of leasing which was formerly given to every tenant for life under a properly drawn settlement. We have seen (*m*) that a tenant for life cannot, by virtue of the right of alienation incident to his estate, make any disposition of the

Where the
estate is of
limited dura-
tion.
Power of
leasing.

(*e*) *Ante*, p. 295.
(*f*) *Ante*, p. 342.
(*g*) *Ante*, pp. 313, 322.
(*h*) *Ante*, p. 322.
(*i*) See Appendix (A).
(*k*) Stat. 3 & 4 Will. IV. c.
105, s. 2; *ante*, p. 299.
(*l*) And if the deed is of a date

previous to that day, even an express declaration contained in the deed that such was the intent of the uses will not be sufficient; *Fry v. Noble*, 20 Beav. 598; 7 De Gex, M. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266.
(*m*) *Ante*, p. 112.

property to take effect after his decease. Such right of alienation, therefore, does not enable him to grant a lease for any certain term of years, but only contingently on his living so long. But if his life estate were limited to him in the settlement by way of *use*, as in practice was always done, a power might be conferred on him of leasing the land for any term of years, and under whatever restrictions might be thought advisable. On the exercise of this power, a use would arise to the tenant for the term of years, and with it an estate for the term granted by the lease, quite independently of the continuance of the life of the tenant for life (*n*). But if the lease attempted to be granted should have exceeded the duration authorized by the power, or in any other respect infringed on the restrictions imposed, it would have been void altogether as an exercise of the power, and might formerly have been set aside by any person having the remainder or reversion, on the decease of the tenant for life. But now, by an Act of 1849 (*o*), such a lease, if made *bond fide*, and if the lessee have entered thereunder, shall be considered in equity as a contract for the grant of a valid lease under the power, to the like purport and effect as such invalid lease, save so far as any variation may be necessary in order to comply with the terms of the power; and all persons, who would have been bound by a lease lawfully granted under the power, shall be bound in equity by such contract (*p*). But in case the reversioner is able and willing during the continuance of the lessee's possession to confirm the lease without variation (*q*), the lessee is bound to accept a confirmation accordingly (*r*). The

Relief against defects in leases under powers.

(*n*) 10 Ves. 256.

(*o*) Stat. 12 & 13 Vict. c. 26, amended by stat. 13 & 14 Vict. c. 17.

(*p*) As to the power of a tenant for life to make a lease for giving effect to such a contract, see stat. 45 & 46 Vict. c. 38, s. 12;

Williams's Conveyancing Statutes, 809—811.

(*q*) As to the power of a tenant for life in reversion to confirm such leases, see stat. 45 & 46 Vict. c. 38, s. 12; Williams's Conveyancing Statutes, 809—811.

(*r*) Stat. 13 & 14 Vict. c. 17,

same Act contains a further provision (*s*), valuable in the case, which sometimes happens, of a power to grant leases in possession being attempted to be exercised by a lease to commence a few days after its date. In such a case, if the lessor's estate shall continue until the day appointed for the commencement of the lease, the lease, which before would have been invalid, is by the statute rendered as valid as if it had been granted on that day. Express powers of leasing, to take effect by virtue of the Statute of Uses, may still be validly created: but in practice their employment is now largely superseded in consequence of the extensive powers of leasing conferred on tenants for life by the Settled Land Act, 1882 (*t*). The enactments mentioned above (*u*) apply in the case of an intended exercise of a statutory, as well as of an express, power of leasing.

Power of
sale and
exchange.

Another instance of a special power occurs in the case of the power of sale and exchange, which, before the year 1883, was usually inserted in settlements of real estate (*x*). This power provided that it should be lawful for the trustees of the settlement, with the consent of the tenant for life in possession under the settlement, and sometimes also at their own discretion during the minority of the tenant in possession, to sell or exchange the settled lands, and for that purpose to revoke the uses of the settlement as to the lands sold or exchanged, and to appoint such other uses in their stead as might be necessary to effectuate the transaction proposed. But it was provided that the money to arise from any such sale, or which might be received for equality of exchange, should be laid out in the

a. 3. Such confirmation may be by signed memorandum, or by acceptance of rent accompanied by signed memorandum (sect. 2).

(*s*) Stat. 12 & 13 Vict. c. 26, s. 4.

(*t*) *Ante*, pp. 113, 114; see Wil-

liams's Conveyancing Statutes, 301.

(*u*) Stats. 12 & 13 Vict. c. 26, ss. 2, 4; 13 & 14 Vict. c. 17.

(*x*) See *ante*, pp. 112, 113 and n. (*n*).

purchase of other lands; and that such lands, and also the lands which might be received in exchange, should be settled by the trustees to the then subsisting uses of the settlement. It was further provided that, until a proper purchase could be found, the money might be invested in the funds or on mortgage, and the income paid to the person who would have been entitled to the rents, if lands had been purchased and settled. The object of this power was to keep up the settlement, and at the same time to facilitate the acquisition of lands which for any reason might be more desirable, in lieu of any of the settled lands which it might be expedient to part with. The direction to lay out the money in the purchase of other lands made the money, even before it was laid out, real estate in the contemplation of equity (*y*); and though no land should ever have been purchased, the parties entitled under the settlement would have taken in equity precisely the same estates in the investments of the money, as they would have taken in any lands which might have been purchased therewith. The power given to the trustees to revoke the uses of the settlement and appoint new uses, enabled them, by virtue of the Statute of Uses, to give the purchaser of the settled property a valid estate in fee simple, provided only that the requisitions of the power were complied with. And an enactment of the year 1859 enabled the Court to relieve a *bonâ fide* purchaser under such a power, in case the tenant for life, or any other party to the transaction, should by mistake have been allowed to receive for his own benefit a portion of the purchase-money, as the value of the timber or other articles (*z*). Previously to this statute the Courts of Equity had not considered themselves authorized to give relief in such a case (*a*). Since the commencement

Relief against mistaken payment by purchaser.

(*y*) *Ante*, p. 174; see also Williams on Personal Property, 368, 383—390, 18th ed.

(*z*) Stat. 22 & 23 Vict. c. 35,

s. 13.

(*a*) *Cockerell v. Cholmoley*, 1 Russ. & M. 418.

of the year 1883, the employment in settlements of express powers of sale and exchange has been rendered unnecessary, in consequence of the powers of sale and exchange given to tenants for life by the Settled Land Act, 1882 (*b*). And in drawing a settlement of land, it is now generally the practice to omit express powers of sale and exchange, as well as of leasing (*c*).

As to sales
reserving
minerals.

It was decided that the ordinary power of sale and exchange contained in settlements did not authorize the trustees to sell the lands with a reservation of the minerals (*d*). In consequence of this decision, which took the profession rather by surprise, an Act was passed (*e*) which confirmed all sales, exchanges, partitions and enfranchisements theretofore made, in intended exercise of any trust or power, of land with an exception or reservation of minerals, or of the minerals separately from the residue of the land (*f*). And it was provided that for the future every trustee and other person authorized to dispose of land by way of sale, exchange, partition or enfranchisement, might, with the sanction of the Court of Chancery, now represented by the Chancery Division of the High Court, dispose of the land without the minerals, or of the minerals without the land, unless forbidden so to do by the instrument creating the trust or power (*g*). A sale, exchange, partition or mining lease may be made, under the powers conferred by the Settled Land Act, 1882 (*h*), either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers and

(*b*) *Ante*, pp. 113, 116.

(*c*) See Williams's Conveyancing Statutes, 297, 515, 517; *ante*, p. 113.

(*d*) *Buckley v. Howell*, 39 Beav. 548.

(*e*) Stat. 25 & 26 Vict. c. 108.

(*f*) Sect. 1.

(*g*) Stat. 25 & 26 Vict. c. 108, s. 2.

(*h*) Stat. 44 & 45 Vict. c. 38, see *ante*, pp. 114, 116.

privileges connected with mining purposes in relation to the settled land, or any part thereof, or any other land (i).

Other kinds of special powers occur where the *persons* who are to take estates under the powers are limited to a certain class. Powers to jointure a wife, and to appoint estates amongst children, are the most useful powers of this nature. When the objects are limited.

It is provided, by the Succession Duty Act, 1853, The Succession Duty Act, 1853. that where any person shall have a general power of appointment, under any disposition of property taking effect upon the death of any person, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property thereby appointed, as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon any such death, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor (k). But where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property (l).

Powers may, generally speaking, be destroyed or Powers may

(i) Sect. 17, sub-s. 1. By sub-s. 2, an exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

(k) Stat. 16 & 17 Vict. c. 51,

s. 4. See *Re Barker*, Exch., 7 Jur., N. S. 1061; *Attorney-General v. Floyer*, H. of Lords, 9 Jur., N. S. 1; 9 H. of L. Cas. 477; *Charlton v. Attorney-General*, 4 App. Cas. 427; *ante*, p. 241.

(l) Sect. 53.

be extin-
guished by
release.

Exceptions.

Release of
powers by
married
women.

Disclaimer of
a power.

extinguished by deed of release made by the donee or owner of the power to any person having any estate of freehold in the land; "for it would be strange and unreasonable that a thing, which is created by the act of the parties, should not by their act, with their mutual consent be dissolved again" (*m*). And it is now expressly enacted that a person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power (*n*). The exceptions to this rule appear to be all reducible to the simple principle, that if the duty of the donee of the power may require him to exercise it at any future time, then he cannot extinguish it by release (*o*). By the Act for the abolition of fines and recoveries (*p*), it is provided (*q*), that every married woman may, with the concurrence of her husband, by deed to be acknowledged by her as her act and deed according to the provisions of the Act (*r*), release or extinguish any power which may be vested in or limited or reserved to her, in regard to any lands of any tenure, or any money subject to be invested in the purchase of lands (*s*), or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole (*t*). A power, whether coupled with an interest or not, may now be effectually disclaimed (*u*) by deed (*x*). The above remarks as to the extinguishment of powers are not intended to apply to statutory powers, which are regulated by the terms of the statute

(*m*) *Albany's case*, 1 Rep. 110 b, 118 a; *Smith v. Death*, 5 Mad. 371; *Horner v. Swann*, Turn. & Russ. 430.

(*n*) Stat. 44 & 45 Vict. c. 41, s. 52. See Williams's Conveyancing Statutes, 226.

(*o*) See 2 Chance on Powers, 584; Williams's Conveyancing Statutes, 227.

(*p*) Stat. 3 & 4 Will. IV. c. 74.

(*q*) Sect. 77.

(*r*) See *ante*, p. 284.

(*s*) See *ante*, p. 174.

(*t*) As to the capacity of married women to release or extinguish powers since the commencement of the Married Women's Property Act, 1882, see Williams's Conveyancing Statutes, 383—386.

(*u*) See *ante*, p. 81.

(*x*) Stat. 45 & 46 Vict. c. 39, s. 6. see Williams's Conveyancing Statutes, 280, 281.

creating them. Thus we have seen that the powers given to a tenant for life by the Settled Land Act, 1882, are not capable of release; and a contract by a tenant for life not to exercise any of his powers under that Act is void (*y*). Our notice of powers must here conclude. On a subject so vast, much must necessarily remain unsaid. The masterly treatise of Sir Edward Sugden (afterwards Lord St. Leonards), and the accurate work of Mr. Chance on Powers, will supply the student with all the further information he may require.

2. An executory interest may also be created by will. Before the passing of the Statute of Uses (*z*), wills were employed only in the devising of uses, under the protection of the Court of Chancery, except in some few cities and boroughs where the legal estate in lands might be devised by special custom (*a*). In giving effect to these customary devises, the Courts, in very early times, showed great indulgence to testators (*b*); and perhaps the first instance of the creation of an executory interest occurred in directions given by testators, that their executors should sell their tenements. Such directions were allowed by law in customary devises (*c*); and in such cases it is evident that the sale by the executors operated as the execution of a power to dispose of that in which they themselves had no kind of ownership. For executors, as such, have nothing to

Creation of
executory
interests by
will.

Directions
that executors
should sell
lands devis-
able by cus-
tom.

(*y*) *Ante*, pp. 119, 120.

(*z*) 27 Hen. VIII. c. 10.

(*a*) *Ante*, p. 70.

(*b*) 30 Ass. 183 a; Litt. sec. 536.

(*c*) Year Book, 9 Hen. VI. 24 b, Babington:—"La nature de devis ou terres sont devisables est, que on peut deviser que la terre sera vendu par executors, et ceo est bon, come est dit adevant, et est marvellous ley de raison: mes ceo est le nature d'un devis, et devise ad este use tout temps en tiel forme; et issint on aura loy- alment franktenement de cesty

qui n'avoit rien, et en meme le maniere come on aura *fi*re from *fi*nt, et uncore nul *fi*re est deins le *fi*nt: et ceo est pour performer le darrien volonte de le devisor." Paston.—"Une devis est marveil- ous en lui meme quand il peut prendre effect; car si on devise en Londres que ses executors ven- dront ses terres, et devise acisi; son heir est eins par descent, et encore par le vend des executors il sera ouste." See also Litt. s. 169.

Directions
that executors
should sell
lands of
which others
were seised to
the testator's
use.

do with freeholds. Here, therefore, was a future estate or executory interest created; the fee simple was shifted away from the heir of the testator, to whom it had descended, and became vested in the purchaser, on the event of the sale of the tenement to him. The Court of Chancery also, in permitting the devise of the *use* of such lands as were not themselves devisable, allowed of the creation of executory interests by will, as well as in transactions between living persons (*d*). And in particular directions given by persons having others seised of lands to their use, that such lands should be sold by their executors, were not only permitted by the Court of Chancery, but were also recognised by the legislature. For, by a statute of the reign of Henry VIII. (*e*), of a date previous to the Statute of Uses, it is provided, that in such cases, where part of the executors refuse to take the administration of the will, and the residue accept the charge of the same will, then all bargains and sales of the lands so willed to be sold by the executors, made by him or them only of the said executors that so doth accept the charge of the will, shall be as effectual as if all the residue of the executors so refusing, had joined with him or them in the making of the bargain and sale.

The Statute
of Uses.

But, as we have seen(*f*), the passing of the Statute of Uses abolished for a time all wills of uses, until the Statute of Wills (*g*) restored them. When wills were restored, the uses, of which they had been accustomed to dispose, had been all turned into estates at law; and such estates then generally came, for the first time, within the operation of testamentary instruments. Under these circumstances, the courts of law in interpreting wills, adopted the same lenient construction which had formerly been employed by themselves in

(*d*) Perk. ss. 507, 528.

(*e*) Stat. 21 Hen. VIII. c. 4.

(*f*) *Ante*, pp. 71, 164, 221.

(*g*) 32 Hen. VIII. c. 1.

the interpretation of customary devises, and also by the Court of Chancery in the construction of devises of the ancient use. The statute which, in the case of wills of *uses*, had given validity to sales made by the executors accepting the charge of the will, was extended, in its construction, to directions (now authorized to be made) for the sale by the executors of the *legal estate*, and also to cases where the legal estate was devised to the executors to be sold (*h*). Future estates at law were also allowed to be created by will, and were invested with the same important attribute of indestructibility which belongs to all executory interests. These future estates were called *executory devises*, and in some respects they appear to have been more favourably interpreted than shifting uses contained in deeds (*i*), though, generally speaking, their attributes are the same. To take a common instance: *Example.* a man may, by his will, devise lands to his son A., an infant, and his heirs; but in case A. should die under the age of twenty-one years, then to B. and his heirs. In this case A. has an estate in fee simple in possession, subject to an executory interest in favour of B. If A. should not die under age, his estate in fee simple will continue with him unimpaired. But if he should die under that age, nothing can prevent the estate of B. from immediately arising, and coming into possession, and displacing for ever the estate of A. and his heirs. Precisely the same effect might have been produced by

(*h*) *Bonifant v. Greenfield*, Cro. Eliz. 80; Co. Litt. 118 a; see *Mackintosh v. Barber*, 1 Bing. 50.

(*i*) In the cases of *Adams v. Savage*, (2 Lord Raym. 855; 2 Salk. 679), and *Rawley v. Holland* (22 Vin. Abr. 189, pl. 11), limitations which would have been valid in a will by way of executory devise were held to be void in a deed by way of shifting or springing use. But these cases have been doubted by Mr. Serjeant Hill

and Mr. Sanders (1 Sand. Uses, 142, 143; 148, 5th ed.), and denied to be law by Mr. Butler (note (*g*) to Fearn, Cont. Rem. p. 41). Mr. Preston also lays down a doctrine opposed to the above cases (1 Prest. Abst. 114, 180, 181). Sir Edward Sugden, however, supports these cases, and seems sufficiently to answer Mr. Butler's objection (Sugd. Gilb. Uses and Trusts, 36, note).

a conveyance to uses. A conveyance to C. and his heirs, to the use of A. and his heirs, but in case A. should die under age, then to the use of B. and his heirs, would have effected the same result. Not so, however, a direct conveyance independently of the Statute of Uses. A conveyance directly to A. and his heirs would vest in him an estate in fee simple, after which no limitation could follow. In such a case, therefore, a direction that, if A. should die under age, the land should belong to B. and his heirs, would fail to operate on the legal seisin; and the estate in fee simple of A. would, in case of his decease under age, still descend, without any interruption, to his heir at law.

Difference
between a
contingent
remainder
and an exe-
cutory devise.

A good illustration of the difference between a contingent remainder and an executory devise occurs in the case of a devise of lands by will to A. for life, with remainder in fee to such son of B. as shall first attain the age of twenty-one years. In this case the limitation to the son of B. is either a contingent remainder or an executory devise, according as A., the tenant for life, may or may not survive the testator. If A. should survive the testator, there will be an estate of freehold subsisting in the premises, for the determination of which the limitation to the son of B. must wait, before it can take effect in possession. This limitation is, therefore, a remainder; and, as it depends on the contingency of B. having a son who may attain twenty-one, it is a contingent remainder. But if A. should die in the lifetime of the testator, the will would start, on the testator's death, with a simple limitation to such son of B. as shall first attain the age of twenty-one years. This limitation has not to wait for the determination of any prior estate of freehold; but it arises of itself on the event of a son of B. attaining the age of twenty-one years; and it displaces, when it takes

effect, the estate in fee simple, which, not being otherwise disposed of, descends, immediately on the death of the testator, to his heir at law. It is, therefore, in this case, not a contingent remainder, but an executory devise. Under the law as it stood before the Act of 1877 amending the law as to contingent remainders (*k*), if A. survived the testator, but died before any son of B. attained twenty-one, the limitation failed for want of an estate of freehold to support it: whereas if A. died in the lifetime of the testator, it was not liable to any failure. It was to remedy the hardship occasioned by the failure of such a limitation as this, when it occurred in the shape of a contingent remainder, that the Act above mentioned was framed.

The alienation of an executory interest, before its becoming an actually vested estate, was formerly subject to the same rules as governed the alienation of contingent remainders (*l*). But by the Act to amend the law of real property, all executory interests may now be disposed of by deed (*m*). Accordingly, to take our previous example, if a man should leave lands, by his will, to A. and his heirs, but in case A. should die under age, then to B. and his heirs,—B. may by deed, during A.'s minority, dispose of his expectancy to another person, who, should A. die under age, will at once stand in the place of B. and obtain the fee simple.

(*k*) Stat. 40 & 41 Vict. c. 83, *ante*, p. 333.

(*l*) *Ante*, p. 336.

(*m*) Stat. 8 & 9 Vict. c. 106, s. 6, repealing stat. 7 & 8 Vict. s. 76, s. 5. In order to facilitate the payment of debts out of real estate, it is provided, by stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 12, and 2 & 3 Vict. c. 60, that when lands are by law, or by the will of their owner, liable to the payment of his debts, and are by the will vested in any person by

way of executory devise, the first executory devisee, even though an infant, may convey the whole fee simple in order to carry into effect any decree for the sale or mortgage of the estate for payment of such debts. And this provision, so far as it relates to a sale, has been extended to the case of the land having descended to the heir, subject to an executory devise over in favour of a person or persons not existing or not ascertained; stat. 11 & 12 Vict. c. 87.

Sale or mortgage for payment of debts.

But before the Act, this could not have been done; B. might indeed have sold his expectancy; but *after* the event (the decease of A. under age), B. must have executed a conveyance of the legal estate to the purchaser; for, until the event, B. had no *estate* to convey (*n*).

Estates arising by force of statute on execution of a statutory power.

Conveyance by tenant for life under Settled Land Act, 1882.

Similar to an estate arising by executory devise, is an estate which arises solely by the force of a statute, upon the execution of some statutory power. This occurs whenever an estate in land is transferred by any person by means of an authority conferred upon him by some statute, and not by means of the right of alienation incident to an estate in land or of a power given to him under the Statute of Uses or by a will. For example, by the Settled Land Act, 1882, a tenant for life under a settlement is empowered to convey the settled land by deed for all the estate and interest, which is the subject of the settlement, or for any less estate or interest, as may be required for carrying into effect the powers of leasing, sale, exchange, partition and other powers given by that Act (*o*). He may thus convey the whole legal estate in fee simple in the settled land, if comprised in the settlement, even though he himself should have merely an equitable estate for life (*p*). When a tenant for life exercises his power of conveyance under this Act, the legal estate in the settled land is, by the force of the statute, taken away from the persons, in whom it has been previously vested, and conveyed to the lessee, purchaser or other person, to the extent specified in the deed, by which the lease, purchase or other transaction is carried out. Thus the estate limited by such a deed arises solely by virtue of the Act, which has empowered the tenant for life to

(*n*) *Ante*, p. 336.

(*o*) Stat. 45 & 46 Vict. c. 38, s. 20. See *ante*, pp. 114—119;

Williams's Conveyancing Statutes, 321—325.

(*p*) See *ante*, p. 177.

convey. The operation of such a statutory power is therefore different from that of a power to appoint the *use* of land, which takes effect under the Statute of Uses. So that if land be conveyed under a statutory power to A. and his heirs to the use of B. and his heirs, B., not A., will take the fee simple at law (*q*). Another example of estates arising by force of statute upon the execution of a statutory authority is afforded by the effect of a declaration made by a person appointing new trustees under the Conveyancing Act of 1881, that the estate in any land, which is subject to the trust, shall vest in the persons who will thenceforward be the trustees (*r*).

(*q*) *Ante*, pp. 166, 352; Sug. Pow. 45, 146, 196—198, 8th ed.

(*r*) See *ante*, p. 182; Williams's Conveyancing Statutes, 181—184.

CHAPTER IV.

OF REMOTENESS OF LIMITATION.

Limitations
may be void
for remote-
ness.

Perpetuity.

THE limitation of estates to arise at a future time by way of shifting use or executory devise must conform to the requirements of a rule, known as the rule against perpetuities; or else it will be void for remoteness. This rule is founded on a general principle of policy guiding the judges, that all contrivances shall be void, which tend to create a perpetuity, or to place property for ever out of reach of the exercise of the power of alienation (*a*). This principle appears to have been first applied after it had become well settled that an estate tail might be barred by a common recovery, as a reason for holding that any contrivance to restrain a tenant in tail from suffering a recovery shall be of no effect (*b*). When the law came to recognize as valid the limitation of estates in remainder to unborn children, and further to admit the creation of future estates by way of shifting use and executory devise (*c*), it was seen that such devices, unless restrained within due bounds, might pave the way to perpetual settlement of land; and the same principle of policy was again invoked (*d*). In the case of future estates to arise by way of shifting use and executory devise, these due bounds were gradually settled by successive decisions.

(*a*) *Nottingham, C., Howard v. Duke of Norfolk*, 2 Swanst. 454, 460; 8 Cha. Ca. 17, 20, 25, 81—86; 2 P. W. 688; *London & South Western Railway Co. v. Gomm*, 20 Ch. D. 562.
(*b*) 1 Rep. 84 a, 88 a, 181 b; 6 Rep. 40 a; 10 Rep. 42 b; Cro.

Jac. 696—698; *ante*, p. 92, and note (*c*).

(*c*) *Ante*, pp. 325—328, 346, 367—369.

(*d*) See Cro. Jac. 590—598; 2 Swanst. 460—468; 8 Ch. Ca. 17, 20, 25, 81—86; 12 Mod. 287.

Such estates were allowed to take effect, at first, within the compass of an existing life (*e*); then within a *reasonable* time after (*f*). This reasonable time after an existing life was next extended to the period of the minority of an infant actually entitled under the instrument, by which the executory estate was conferred (*g*). After this, it was held that any number of existing lives might be taken (*h*). Finally, it was settled that the time allowed after the duration of existing lives should be a term of twenty-one years, independently of the minority of any person, whether entitled or not; with the possible addition of the period of gestation, but only where the gestation actually exists (*i*).

The rule so settled is what is generally called “the rule against perpetuities;” and it will be convenient so to refer to it. It requires every future estate limited to arise by way of shifting use or executory devise to be such as must necessarily arise within the compass of existing lives and twenty-one years after, with the possible addition of the period of gestation, in the case of some person entitled being a posthumous child. But if no lives are fixed on, then the term of twenty-one years only is allowed (*k*). And every executory estate, which might, in any event, transgress the limits so fixed, will from its commencement be absolutely void. For instance, a gift by way of shifting use or executory devise to the first son of A., a bachelor, who shall attain the age of twenty-four years, is void for remoteness (*l*).

The Rule
against
perpetuities.

Example.

(*e*) *Howard v. Duke of Norfolk*, 3 Ch. Ca. 14; 2 Swanst. 454.

(*f*) *Marks v. Marks*, 10 Mod. 419.

(*g*) *Stephens v. Stephens*, Ca. t. Talb. 228.

(*h*) *Thelluson v. Woodford*, 4 Ves. 227; 11 Ves. 112.

(*i*) *Cadell v. Palmer*, 7 Bligh, N. S. 202.

(*k*) *Lewis on Perpetuities*, 172;

1 Jarm. Wills, 258, 4th ed.

(*l*) *Newman v. Newman*, 10 Sim. 51; *Griffith v. Blunt*, 4 Beav. 248; 1 Jarm. Wills, 263, 264, 4th ed. In the case of an executory gift by *will*, however, the time within which the estate given must arise, is computed from the death of the testator, to whom knowledge of the circumstances then existing is imputed.

For if A. were to die, leaving a son a few months old, the estate of the son would arise, under such a gift, at a time exceeding the period of twenty-one years from the expiration of the life of A., which, in this case, is the life fixed on. But a gift to the first son of A. who shall attain the age of twenty-one years will be valid, as necessarily falling within the allowed period. When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in equity. And even if, in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary. If, however, the executory limitation should be in defeasance of, or immediately preceded by, an estate tail, then, as the estate tail and all subsequent estates may be barred by the tenant in tail, the remoteness of the event on which the executory limitation is to arise will not affect its validity (*m*).

Exception where preceded by an estate tail.

Executory limitations to take effect on failure of issue.

Executory limitations contained in instruments coming into operation after the year 1882 are subject to a further restriction imposed by the Conveyancing Act, 1882 (*n*); in which it is enacted that, where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on de-

So that a gift, which would have been void, if the testator had died immediately after making his will, may be valid at his death. Thus in the example given in the text, if the gift were made by will, and A. were to die before the testator, leaving a son, it would be valid; for the person to take would have been ascertained at the testator's death, and the estate given to him must in such case necessarily arise within a life in being, viz. his own. And the gift would also be valid,

if a son of A. had attained twenty-four before the testator's death, though A. survived the testator; 1 Jarm. Wills, 254, 4th ed.; *Picken v. Matthews*, 10 Ch. D. 264.

(*m*) Butler's note (*h*) to Fearn, Cont. Rem. 562; Lewis on Perpetuities, 669. See *ante*, p. 345, n. (*b*); *Hoasman v. Pearce*, L. R. 7 Ch. 275.

(*n*) Stat. 45 & 46 Vict. c. 39, s. 10. See Williams's Conveyancing Statutes, 288.

fault or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue, who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

In addition to these limits, a restriction is imposed by an Act of George III. (o), on attempts to accumulate the income of property for the benefit of some future owner. This act was occasioned by the extraordinary will of Mr. Thellusson, who directed the income of his property to be accumulated during the lives of all his children, grandchildren and great grandchildren *who were living at the time of his death*, for the benefit of some future descendants to be living at the decease of the survivor (p); thus keeping strictly within the rule which allowed any number of existing lives to be taken as the period for an executory interest. To prevent the repetition of such a cruel absurdity, the Act forbids the accumulation of income for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor, settlor, deviser or testator, or during the minority of any person living, or in *ventre sa mère* at the death of the grantor, deviser or testator, or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income directed so to be accumulated (q). But the Act does not extend (r) to any provision for payment of debts, or for raising portions for children (s), or to any

Restriction on accumulation.

Mr. Thellusson's will.

Stat. 39 & 40 Geo. III. c. 98.

(o) Stat. 39 & 40 Geo. III. N. S. 288.

c. 98; Fearne, Cont. Rem. 588, n. (x).

(p) 4 Ves. 227; Fearne, Cont. Rem. 436, note.

(q) *Wilson v. Wilson*, 1 Sim.,

(r) Sect. 3.

(s) See *Halford v. Stains*, 16 Sim. 488, 496; *Bacon v. Procter*, Turn. & Russ. 81; *Bateman v. Hodgkin*, 10 Beav. 426; *Barring-*

direction touching the produce of timber or wood. Nor does it apply to a trust to expend part of the income of a landed estate in maintaining the property in good repair (*t*). Any direction to accumulate income, which may exceed the period thus allowed, is valid to the extent of the time allowed by the Act, but void so far as this time may be exceeded (*u*). And if the direction to accumulate should exceed the limits allowed by law for the execution of executory interests, it will be void altogether, independently of the above Act (*x*).

Rules for
creation of
contingent
remainders.

Rule 1.

Let us now return to the rules governing the creation of contingent remainders. We have considered the first of these, that the freehold must never be without an owner, or that every contingent remainder must be supported by a particular estate of freehold (*y*). And it will be remembered that, in consequence of this rule, every contingent remainder must vest during the continuance or immediately on the termination of the particular estate, or it will fail altogether (*z*). Also, that an Act of 1877 now saves from this consequence of the rule every contingent remainder created after the Act, which would have been valid if originally created as a shifting use or executory devise (*a*). We have now seen, however, that for a limitation to be valid as a shifting use or executory devise, it must conform to the rule against perpetuities (*b*). No contingent remainder will therefore be preserved by this Act, unless it be such as must necessarily vest within the duration of existing lives

ton v. Liddell, 2 De Gex, M. & G. 480; *Edwards v. Tuck*, 3 De Gex, M. & G. 40.

(*t*) *Vine v. Raleigh*, 1891, 2 Ch. 13.

(*u*) 1 Jarm. Wills, 306, 4th ed. See *Re Lady Rosalyn's Trust*, 18 Sim. 891; *Ralph v. Carrick*, 5 Ch. D. 984, 997, 998.

(*x*) *Lord Southampton v. Marquis of Hertford*, 2 Ves. & Bea. 54;

Ker v. Lord Dungannon, 1 Dr. & War. 509; *Curtis v. Lukin*, 5 Beav. 147; *Broughton v. James*, 1 Coll. 26; *Scarsbrick v. Skelmersdale*, 17 Sim. 187; *Turvin v. Newcome*, 8 Kay & J. 16.

(*y*) *Ante*, p. 330.

(*z*) *Ante*, p. 332.

(*a*) *Ante*, p. 333.

(*b*) *Ante*, p. 375.

and twenty-one years after. Thus, if land be granted after 1877 to A., a bachelor, for life, and after his death to his first son, who shall attain the age of twenty-four years, the gift to A.'s son is good as a contingent remainder, and may take effect if a son of A. attain twenty-four in A.'s lifetime (*c*). But if A. die before any son of his attain twenty-four, the contingent remainder to A.'s son will fail altogether, by the common law rule, as not having vested before or at the termination of the particular estate. And it will not be saved by the Act of 1877 (*d*); because, as we have seen (*e*), it would not have been valid, if originally created as a shifting use or executory devise.

The liability of contingent remainders to be destroyed by the act of the tenant, on whose particular estate they depended, was a great safeguard against the creation of a perpetuity (*f*). But if there had been no check but this, a perpetual settlement might possibly have been made, after the introduction of trustees to preserve contingent remainders (*g*), by giving life estates successively in remainder to successive generations of children. But it seems to have been understood by those concerned in drawing settlements of land in the modern form generally adopted after the Restoration (*h*), that estates given to unborn children should be confined to such as must be ascertained within the compass of existing lives (*i*). For the conveyancing practice established with regard to such settlements was (as it still is) to limit the land to an intended husband, or eldest son coming of age, for life, with remainder to *his* unborn sons successively in tail (*k*). And attempts to confer successive life estates on successive generations

Perpetuity
in the case of
contingent
remainders.

(*c*) *Ante*, p. 332.

(*d*) *Ante*, p. 333.

(*e*) *Ante*, p. 375.

(*f*) *Ante*, pp. 336, 374; see 1 Rep. 120, 131 b.

(*g*) *Ante*, p. 342.

(*h*) *Ante*, p. 108.

(*i*) *Ante*, p. 375.

(*k*) See the books cited in note (*n*) to p. 113, *ante*.

of unborn children were held to violate the principle of policy mentioned above (*l*). After a time, the restraint imposed on the creation of successive contingent remainders came to be generally defined in a sort of working rule adopted by conveyancers and quoted by judges, that an estate given to an unborn person for life cannot be followed by any estate to any child of such unborn person. And it was allowed on all hands that, if such a limitation were made, the estate given to the child of the unborn person would be void (*m*). The reason assigned for this, however, was not always the same; for the origin of the rule was attributed sometimes to the general policy of the law restraining attempts to create a perpetuity, sometimes to the old doctrine which prohibited double possibilities (*n*). This rule gained authority from general use (*o*). After the period allowed for the creation of executory interests had been extended to an independent term of twenty-one years after the duration of existing lives (*p*), it was much debated, whether the rule so applied to contingent remainders should or should not be considered as merely an instance of the settled rule against perpetuities (*q*). But limitations likely to raise this question were eschewed in practice (*r*). The point first came before the Court in 1889, when the judges were apparently not inclined to sanction any possible

(*l*) *Ante*, p. 374; *Humberston v. Humberston*, 1 P. W. 332; 1 Atk. 593; *Seaward v. Willock*, 5 East, 198, 205.

(*m*) *Duke of Marlborough v. Earl Godolphin*, 1 Eden, 415, 416; 2 Cases and Opinions, 432—441; *Hay v. Earl of Coventry*, 3 T. R. 86; *Bradenell v. Elwes*, 1 East, 452; *Fearne's Posthuma*, 215; *Fearne*, Cont. Rem. 502, 565, Butl. note; 2 Prest. Abst. 114; Sug. Pow. 893, 8th ed.

(*n*) *Ante*, pp. 384, 385; *Fearne*, Cont. Rem. 251, n., 502, 565, n.; Co. Litt. 371 b, n. (1), vii. 2; *Vaizey*, Law Quarterly Review, vi. 419. Historically, the former explana-

tion seems to be the correct one; *Gray*, Rule against Perpetuities (Boston, 1886), pp. 185, 137, 189, 140, 206—208.

(*o*) *Cole v. Senell*, 2 H. L. C. 186; *Monypenny v. Dering*, 2 De G. M. & G. 145, 170; Sugden on Property, 120; Sugden on the Real Property Statutes, p. 235, n. (a), 1st ed., 274, n. (a), 2nd ed.; 1 Jarm. Wills, 221, 1st ed., 251, 4th ed.; Williams on Real Property, 212, 1st ed., 276, 13th ed.

(*p*) *Ante*, p. 375.

(*q*) See Appendix E., and the editor's note thereto.

(*r*) Davidson, Prec. Conv. vol. iii. pp. 386—338, 3rd ed.

extension of the time of settlement for the sake of introducing a uniform rule. Accordingly, the working rule of conveyancers was declared to be an independent rule of law; and a remainder limited to the child of an unborn person, after a life estate to the unborn parent, was held to be void, notwithstanding that the gift in remainder had been expressly confined to such child of the unborn parent as should be born within the compass of lives existing at the time of the gift (s). The creation of contingent remainders of legal estates is therefore subject to the rule, that an estate cannot be well limited, in remainder after an estate given to an unborn person for life, to any child of such unborn person. Rule 2

The above rule is, however, subject to some modification, when the gift is made by will. For in the case of a gift *by will* to the unborn son of some living person for his life, and after the decease of such unborn son, to *his* sons in tail, the Courts of law have been so indulgent to the ignorance of testators, that they have endeavoured to carry the intention of the testator into effect, *as nearly as can possibly be done*, without infringing the rule of law, which makes such a remainder void. Accordingly, they take the liberty of altering his will to what they presume he would have done had he been acquainted with the rule which prohibits the son of any unborn son from being, in such circumstances, the object of a gift. This, in law French, is called the *cy-près doctrine* (t). From what has already been said, it will be apparent that the utmost that can be legally accomplished towards securing an estate in a family is to give to the unborn sons of a living person estates in tail: such estates, if not barred, will descend

(s) *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85; see Law Quarterly Review, vi. 410 *et seq.* 4th ed.; *Vanderplank v. King*, 3 Hare, 1; *Monypenny v. Dering*, 16 Mec. & Wels. 418; *Hampton v. Holman*, 5 Ch. Div. 188.

(t) *Fearne, Cont. Rem.* 204, note; 1 *Jarman on Wills*, 298,

on the next generation ; but the risk of the entails being barred, cannot by any means be prevented. The Courts, therefore, when they meet with such a disposition as above described, instead of confining the unborn son of the living person to the mere life estate given him by the terms of the will, and annulling the subsequent limitations to his offspring, give to such son an estate in tail, so as to afford to his issue a chance of inheriting should the entail remain unbarred. But this doctrine, being rather a stretch of judicial authority, is only applied where the estates given by the will to the children of the unborn child are estates in tail, and not where they are estates for life (*u*), or in fee simple (*x*). If, however, the estate be in tail, the rule equally applies, whether the estates tail be given to the sons successively according to seniority, or to all the children equally as tenants in common (*y*).

Rule 2.

But in the same year, in which the second rule here given was established as law, a case occurred for which the above rules were insufficient to provide. Accordingly, the policy of the law restraining every contrivance to create a perpetuity (*z*) was again invoked ; and the limitation of successive contingent remainders was declared to be subject to a further rule, which appears to be this :—that a contingent remainder limited to take effect after a contingent remainder will be void, unless it must necessarily vest within the period allowed by the rule against perpetuities (*a*). Thus, if land be limited to A., a bachelor, for life, and after his death to his first son for life, and after the son's death, to A.'s eldest

(*u*) *Seaward v. Willock*, 5 East, 198. See, however, per Rolt, L. J., in *Forsbrook v. Forsbrook*, L. R., 8 Ch. 93, 99; and per Jessel, M. R., in *Hampton v. Holman*, 5 Ch. Div. 188, 193.

(*x*) *Bristow v. Ward*, 2 Ves. jun. 336; *Hale v. Pew*, 25 Beav. 335.

(*y*) *Pitt v. Jackson*, 2 Bro. C. C. 51; *Vanderplank v. King*, 3 Hare, 1.

(*z*) *Ante*, p. 374.

(*a*) *Re Frost*, 43 Ch. D. 246. See 1 Jarm. Wills, 281, 4th ed. All limitations ulterior to a void remainder are, as a rule, also void; *ib.* 283—288.

daughter who shall *then* be living ; here the contingent remainder to A.'s eldest daughter living at his son's death will be void ; because it could not vest till the son's death, which might obviously occur more than twenty-one years after the death of A. This rule, however, is subject to the proviso, that it shall not apply to the case of a contingent remainder limited to take effect on the termination of an estate tail originally limited as a contingent remainder ; for in this case the latter remainder may be defeated by barring the entail ; it does not therefore tend to tie up property beyond all power of alienation (*b*).

Contingent remainders of trust estates (*c*) are void if they are limited, so that they may exceed the limit prescribed by law to the creation of executory interests (*d*). Thus, if land be conveyed unto and to the use of trustees and their heirs, upon trust for A. for life, and after his decease for such son of A. as shall first attain the age of twenty-four years, the limitation to the son of A. is void for remoteness (*e*). The reason for this distinction between legal and equitable estates is, that, in the case of the latter, the freehold is in the trustees, and the rule of law, that a contingent remainder would fail if it did not vest before or at the termination of the particular estate, cannot apply (*f*). And equity, in giving effect to contingent remainders of trust estates, has held them to be subject to the rules as to remoteness, which apply to executory interests.

It thus appears that the general principle of legal policy, forbidding all such limitations as tend to create a perpetuity, has been applied to contingent remainders

(*b*) *Nicolls v. Sheffield*, 2 Bro. C. C. 215; *Phillips v. Deakin*, 1 M. & S. 744; *Cole v. Sewell*, 2 Conn. & Laws. 344; 4 Dru. & War. 1; 2 H. L. C. 186; Sugd. Law of Property, 120.

(*c*) *Ante*, p. 343.

(*d*) *Abbiss v. Burney*, 17 Ch. D. 211.

(*e*) *Ante*, p. 375.

(*f*) *Ante*, p. 344.

Contingent
remainders
of trust
estates.

as well as executory interests. But when we inquire, what limitations in particular are held to create a perpetuity, we find that the law has answered the question in one way as regards contingent remainders of legal estates, and in another as regards executory interests and contingent remainders of equitable estates: the result is that the subject of remoteness of limitation is particularly distinguished by what the Romans termed *inelegantia juris*. This is, no doubt, deplorable; but, as has been already pointed out (*g*), we must take the law as we find it.

Estates under special power take effect as if they had been inserted in the settlement.

Where powers of appointment are given in favour of particular objects, as the appointor's children (*h*), the estates which arise from the exercise of the power take effect precisely as if such estates had been inserted in the settlement, by which the power was given. Each estate, as it arises under the power, takes its place in the settlement in the same manner as it would have done had it been originally limited to the appointee, without the intervention of any power; and, if it would have been void for remoteness in the original settlement, it will be equally invalid as the offspring of the power (*i*).

Succession Duty.

Before leaving the subject of settlements, it may be mentioned that by the Succession Duty Act, 1853 (*k*), every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the

(*g*) *Ante*, p. 4, n. (*i*).

(*h*) *Ante*, p. 365.

(*i*) Co. Litt. 271 b, n. (1), vii. 2; *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85.

(*k*) Stat. 16 & 17 Vict. c. 51, s. 2; see *Wilcox v. Smith*, 4 Drew. 40; *Attorney-General v. Lord Middleton*, 3 H. & N. 125;

Attorney-General v. Sibthorpe, 3 H. & N. 424; *Attorney-General v. Lord Braybrooke*, 5 H. & N. 488; 9 H. L. C. 150; *Attorney-General v. Floyer*, 9 H. L. C. 477; *Attorney-General v. Smythe*, 9 H. L. Cas. 498; *Charlton v. Attorney-General*, 4 App. Cas. 427.

death of any person dying after the 19th of May, 1853, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, is deemed to confer on the person so entitled a "succession;" in respect of which he is charged with duty payable on his becoming entitled in possession (*l*). So that "successions" chargeable with duty may arise on the death, after the Act, of a tenant for life under any settlement made before or after the Act. In such cases the rate of duty is determined by the relationship between the successor and the settlor. Such successions may also be chargeable with estate Estate duty. duty (*m*). The nature of succession duty in the case of a succession to real property has been already explained (*n*).

(*l*) Sects. 10, 20.
 (*m*) *Ante*, p. 242.

(*n*) *Ante*, p. 241.

CHAPTER V.

OF HEREDITAMENTS PURELY INCORPOREAL.

Three kinds of
purely incor-
poreal here-
ditaments.

WE now come to the consideration of incorporeal hereditaments, usually so called, which, unlike a reversion, a remainder, or an executory interest, are ever of an incorporeal nature, and never assume a corporeal shape. Of these purely incorporeal hereditaments there are three kinds, namely, first, such as are *appendant* to corporeal hereditaments; secondly, such as are *appurtenant*; both of which kinds of incorporeal hereditaments are transferred simply by the conveyance, by whatsoever means, of the corporeal hereditaments to which they may belong; and thirdly, such as are *in gross*, or exist as separate and independent subjects of property, and which are accordingly said to lie in grant, and have always required a deed for their transfer (*a*). But almost all purely incorporeal hereditaments may exist in both the above modes, being at one time appendant or appurtenant to corporeal property, and at another time separate and distinct from it.

A seignory.

1. Of incorporeal hereditaments which are appendant to such as are corporeal, the first we shall consider is a seignory or lordship. In a previous part of our work (*b*), we have noticed the origin of manors. Of such of the lands belonging to a manor as the lord granted out in fee simple to his free tenants, nothing remained to him but his seignory or lordship. By the grant of an estate in fee simple, he necessarily parted with the possession.

(*a*) *Ante*, p. 31.

(*b*) *Ante*, p. 41.

Thenceforth his interest, accordingly, became incorporeal in its nature. But he had no reversion; for no reversion can remain, as we have already seen (*c*), after an estate in fee simple. The grantee, however, became his tenant, did to him fealty, and paid to him his rent-service, if any were agreed for. This simply having a free tenant in fee simple was called a seignory. To this seignory the rent and fealty were incident, and the seignory itself was attached or appendant to the manor of the lord, who had made the grant; whilst the land granted out was said to be holden of the manor. Very many grants were thus made, until the passing of the statute of *Quia emptores* (*d*) put an end to these creations of tenancies in fee simple, by directing that on every such conveyance the feoffee should hold of the same immediate lord as his feoffor held before (*e*). But such tenancies in fee simple as were then already subsisting were left untouched, and they still remain in all cases in which freehold lands are holden of any manor. The incidents of such a tenancy, so far as respects the tenant, have been explained in the chapter on free tenure. The correlative rights belonging to the lord form the incidents of his seignory. The seignory, with all its incidents, is an appendage to the manor of the lord, and a conveyance of the manor simply, without mentioning its appendant seignories, will accordingly comprise the seignories, together with all rents incident to them (*f*). In ancient times it was necessary that the tenants should attorn to the feoffee of the manor, before the rents and services could effectually pass to him (*g*). For, in this respect, the owner of a seignory was in the same position as the owner of a reversion (*h*). But the same statute (*i*) which abolished attornment in

(*c*) *Ante*, p. 315.

(*d*) 18 Edw. I. c. 1.

(*e*) *Ante*, pp. 38, 69.

(*f*) *Perk.* s. 116.

(*g*) *Co. Litt.* 310 b.

(*h*) *Ante*, p. 310.

(*i*) Stat. 4 & 5 Anne, c. 3 (c. 16 in Ruffhead, s. 9; *ante*, p. 310.

the one case abolished it also in the other. No attornment, therefore, is now required.

Rights of
common.

Common of
pasture.

Other kinds of appendant incorporeal hereditaments are rights of *common*, such as *common of turbary*, or a right of cutting turf in another person's land; *common of piscary*, or a right of fishing in another's water; and *common of pasture*, which is the most usual, being a right of depasturing cattle on the land of another (*k*). Rights of common owe their origin to the necessities of the agricultural village communities, which, as we have seen (*l*), were spread over England at the time of the Norman Conquest (*m*). It will be remembered that the land used to be cultivated upon the common field system, the various holdings being composed of strips of land lying dispersed among the common fields of the village. The rights of common enjoyed by the holders of arable land were accordingly of two kinds; first, to put in cattle to range over the whole of a common field, during such time as it lay fallow; secondly, to pasture their cattle on the waste lands of the village. The holders of strips in the common meadows also enjoyed the right of putting in cattle to graze over the whole, when not closed for raising the hay-crop (*n*). When the English *maneria* had been generally subjected to the law of feudal tenure (*o*), it was considered that the soil of the waste lands of a manor belonged to the lord of the manor, subject, however, to the common rights of his tenants to depasture cattle thereon (*p*). And after the free-

(*k*) For further information upon this subject the reader is referred to the late author's *Treatise on Rights of Common*.

(*l*) *Ante*, p. 39.

(*m*) Williams on Commons, 37 *et seq.*; Vinogradoff, *Villainage in England*, Essay II., ch. ii.

(*n*) *Ante*, pp. 39, 40; Vино-

gradoff, *Villainage in England*, 259, 260.

(*o*) *Ante*, p. 41.

(*p*) See Bract. fo. 227, 228; Williams on Commons, 108 *et seq.*, 150; Scrutton, Commons, 39-41; Vinogradoff, *Villainage in England*, 271-275.

holders had become the most prominent tenants of a manor (*q*), it was established as law that every freeholder of ancient arable land held of a manor may, of common right (that is, by the common law alone, independently of grant or agreement) depasture on the lord's wastes such a number of commonable beasts as he can maintain, when the common is not available, upon his holding (*r*). And this right was designated common appendant (*s*). The right of common pasture in the common fields appears, properly, to have been also of common right (*t*). Owing to the general inclosure of common lands, which has been before mentioned (*u*), rights of common in common fields are now practically extinct. Rights of common over wastes have been also extinguished in many cases by the inclosure of waste lands (*x*). But in other cases they still remain, and of late years they have in many instances been successfully asserted (*y*). Any conveyance of the lands, to which such rights belong, will comprise such rights of common also (*z*). The regulation of Metropolitan and other commons is now provided for by statute (*a*).

Another kind of appendant incorporeal hereditament is an advowson appendant to a manor. But on this head we shall reserve our observations till we speak of the now more frequent subject of conveyance, an advowson *in gross*, or an advowson unappended to any thing corporeal.

(*q*) *Ante*, pp. 42, 48.

(*r*) Williams on Commons, 31 *et seq.*, 108.

(*s*) Litt. s. 184; Co. Litt. 122 a; 5 Rep. 87, 38. See Appendix F.

(*t*) Williams on Commons, 67—69; Vinogradoff, Villainage in England, 261, 268—271.

(*u*) *Ante*, p. 59.

(*x*) See Williams on Commons, 246 *et seq.*; Scrutton, Commons, Ch. vi., vii.

(*y*) See *Smith v. Earl Brownlow*, L. R., 9 Eq. 241; *Warrick v. Queen's College*, L. R., 10 Eq. 105, 6 Ch. 716; *Betts v. Thompson*, L. R., 6 Ch. 732; *Hall v. Byron*, 6 Ch. D. 667; *Robertson v. Hartopp*, 43 Ch. D. 484.

(*z*) Litt. s. 188; Co. Litt. 121 b.

(*a*) Stats. 29 & 30 Vict. c. 122; 32 & 33 Vict. c. 107; 39 & 40 Vict. c. 56, amended by 42 & 43 Vict. c. 37; Williams on Commons, 255 *et seq.*

Advowson
appendant.

Strips of waste by the side of roads.

In connection with the subject of commons, it may be mentioned that strips of waste land between an inclosure and a highway, and also the soil of the highway to the middle of the road, presumptively belong to the owner of the inclosure (*b*). And a conveyance of the inclosure (*c*), even by reference to a plan which does not comprise the highway (*d*), will carry with it the soil as far as one-half the road. But if the strips of waste land communicate so closely to a common as in fact to form part of it, they will then belong to the lord of the manor, as the owner of the common (*e*). Where a public way is foundrous, as such ways frequently were in former times, the public have by the common law a right to travel over the adjoining lands, and to break through the fences for that purpose (*f*). It is said that in former times the landowners, to prevent their fences being broken and their crops spoiled when the roads were out of repair, set back their hedges, leaving strips of waste at the side of the road, along which the public might travel without going over the lands under cultivation. Hence such strips are presumed to belong to the owners of the lands adjoining (*g*). Where lands adjoin a river, the soil of one-half of the river to the middle of the stream is presumed to belong to the owner of the adjoining lands (*h*). But if it be a tidal river, the soil up to high water mark appears presumptively to belong to the Crown (*i*). The Crown is also

Soil of river.

(*b*) *Doe d. Pring v. Pearsey*, 7 B. & C. 304; *Scoones v. Morrell*, 1 Beav. 251.

(*c*) *Simpson v. Dendy*, 8 C. B., N. S. 433; see *Leigh v. Jack*, 5 Ex. D. 264.

(*d*) *Berridge v. Ward*, 30 L. J., C. P. 218; 10 C. B., N. S. 400.

(*e*) *Grose v. West*, 7 Taunt. 39; *Doe d. Barrett v. Kemp*, 2 Bing. N. C. 102.

(*f*) Comm. Dig. tit. Chimin, (D. 6); *Daves v. Hawkins*, 8 C. B., N. S. 848.

(*g*) *Steel v. Prickett*, 2 Stark. 468.

(*h*) Hale de jur maris, ch. 1; *Wishart v. Wylie*, 2 Stuart. Thomson, Milne, Morison & Kinnear's Scotch Cases, H. L. 68; *Bickett v. Morris*, L. Rep. 1 Scotch Appeals, 47; *Lord v. The Commissioners for the City of Sydney*, 12 Moore's P. C. Cases, 473; *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133. See *Duke of Devonshire v. Pattinson*, 20 Q. B. D. 263.

(*i*) Hale de jur maris, ch. 4.

presumptively entitled to the sea-shore up to high water mark of medium tides (*k*): although grants of parts of the sea-shore have not unfrequently been made to subjects (*l*); and such grants may be presumed by proof of long continued and uninterrupted acts of ownership (*m*). A sudden irruption of the sea gives the Crown no title to the lands thrown under water (*n*), although when the sea makes gradual encroachments, the right of the owner of the land encroached on is as gradually transferred to the Crown (*o*). And in the same manner when the sea gradually retires, the right of the Crown is as gradually transferred to the owner of the land adjoining the coast (*p*). But a sudden dereliction of the sea does not deprive the Crown of its title to the soil (*q*). Sea-shore.

2. Incorporeal hereditaments *appurtenant* to corporeal hereditaments are not very often met with. They consist of such incorporeal hereditaments as are not naturally and originally appendant to corporeal hereditaments, but have been annexed to them, either by some express deed of grant or by *prescription* from long enjoyment. Rights of common and rights of way or passage over the property of another person are the principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed, they will pass by a conveyance of the lands to which they have been annexed, without mention of the appur-

Appurtenant incorporeal hereditaments arise by grant or prescription.
Appurtenant rights of common and of way.

p. 13; *Gann v. The Fishermen of Whitstable*, 11 H. of L. Cas. 192.

(*k*) *Attorney-General v. Chambers*, 4 De Gex, M. & G. 206; *The Queen v. Gee*, 1 Ellis & Ellis, 1068. As to the rights of a riparian owner upon a navigable tidal river, see *Lyon v. Fishmongers Co.*, 1 App. Cas. 662; *North Shore Railway Co. v. Pion*, 14 App. Cas. 612.

(*l*) *Scrutton v. Brown*, 4 B. &

C. 485, 495.

(*m*) *The Duke of Beaufort v. The Mayor, &c., of Swansea*, 3 Ex. 413; *Calmady v. Rowe*, 6 C. B. 861.

(*n*) 2 Black. Comm. 262.

(*o*) *Re Hull and Selby Railway*, 5 Mee. & Wels. 827.

(*p*) 2 Bl. Comm. 262; *The King v. Lord Yarborough*, 3 B. & C. 91; 5 Bing. 168.

(*q*) 2 Black. Comm. 262.

Appurtenance.

tenances (r); although these words, "with the appurtenances," have been usually inserted in conveyances, for the purpose of distinctly showing an intention to comprise such incorporeal hereditaments of this nature as may belong to the lands. But if such rights of common or of way, though usually enjoyed with the lands, should not have been strictly appurtenant to them, a conveyance of the lands merely, with their appurtenances, without mentioning the rights of common or way, would not have been sufficient to comprise them (s). It was, therefore, usual in conveyances to insert at the end of the "parcels," or description of the property, a number of "general words" in which were comprised, not only all rights of way and common, &c., which might belong to the premises, but also such as might be therewith used or enjoyed (t). But now, by the Conveyancing Act of 1881 (u), a conveyance of land made after the year 1881 shall be deemed to include and shall by virtue of the Act operate to convey, with the land, all commons, ways and other liberties, privileges, easements, rights and advantages whatsoever reputed to appertain to, or at the time of conveyance enjoyed with, the land or any part thereof. In consequence of this enactment general words are now rarely employed (x).

(r) Co. Litt. 121 b.

(s) *Harding v. Wilson*, 2 B. & Cres. 36; *Barlow v. Rhodes*, 1 Cro. & M. 439. See also *James v. Plant*, 4 Adol. & Ellis, 749; *Hinchliffe v. Earl of Kinnoul*, 5 New Cases, 1; *Phyney v. Vicary*, 16 Mee. & Wels. 484; *Ackroyd v. Smith*, 10 C. B. 164; *Worthington v. Gimson*, Q. B., 6 Jur., N. S. 1053; 2 Ellis & Ellis, 618; *Baird v. Fortune*, H. L., 10 W. R. 2; 7 Jur., N. S. 926; *Wardle v. Brocklehurst*, 1 Ellis & Ellis, 1058; *Watts v. Nelson*, L. R., 6 Ch. 166; *Kay v. Orley*, L. R., 10 Q. B. 360; *Brett v. Clowser*, 5 C. P. D. 376; *Barkshire v. Grubb*, 18 Ch. D.

616.

(t) As to the effect of general words, see Williams's Conveyancing Statutes, 60, 65, 66; Williams on Commons, 316-319, 323.

(u) Stat. 44 & 45 Vict. c. 41, s. 6, sub-s. 1; see Williams's Conveyancing Statutes, 60-74. This enactment applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms thereof; s. 6, sub-s. 4.

(x) See Williams's Conveyancing Statutes, 69, 497, and *post*, Part VI.

3. Such incorporeal hereditaments as stand separate and alone are generally distinguished from those which are appendant or appurtenant, by the appellation *in gross*. Of these the first we may mention is a seignory ^{A seignory in gross.} *in gross*, which is a seignory that has been severed from the demesne lands of the manor, to which it was anciently appended (*y*). It has now become quite unconnected with anything, corporeal, and, existing as a separate subject of transfer, it must be conveyed by deed of grant.

The next kind of separate incorporeal hereditament ^{Rent seck.} is a rent seck (*redditus siccus*), a dry or barren rent, so called, because no distress could formerly be made for it (*z*). This kind of rent forms a good example of the antipathy of the ancient law to any inroad on the then prevailing system of tenures. If a landlord granted his seignory, or his reversion, the rent service, which was incident to it, passed at the same time. But if he should have attempted to convey his rent, independently of the seignory or reversion to which it was incident, the grant would have been effectual to deprive himself of the rent, but not to enable his grantee to distrain for it (*a*). It would have been a *rent seck*. Rent seck also occasionally arose from grants being made of rent charges, to be hereafter explained, without any clause of distress (*b*). But, by an Act of Geo. II. (*c*), a remedy by distress was given for rent seck, in the same manner as for rent reserved upon lease. The grantee of a rent seck, however, was not without remedy, at common law, for its recovery. For if he had once received any part of it, he might take proceedings in the nature of a real action against the tenant of the land, out of which the rent issued, if the

(*y*) 1 Scriv. Cop. 5.

(*z*) Litt. s. 218.

(*a*) Litt. ss. 225, 226, 227, 228,

572.

(*b*) Litt. ss. 217, 218.

(*c*) Stat. 4 Geo. II. c. 23, s. 5.

tenant refused further payment (*d*). Indeed, a man might have all manner of real actions of a rent, which issued out of land, if he had once had seisin (*e*) of any part of the rent (*f*). After real actions to recover such rents had been abolished, along with the other real actions (*g*), the grantee of the rent was allowed a remedy, in their place, by suing personally the tenant of the land (*h*).

A rent
charge.

A deed
required.

Registration
of annuities
now required.

The same remedy by action is applicable in the case of another important kind of separate incorporeal hereditament, namely, a rent charge. This arises on a grant by one person to another of an annual sum of money, payable out of certain lands in which the grantor may have any estate. The rent charge cannot, of course, continue longer than the estate of the grantor; but, supposing the grantor to be seised in fee simple, he may make a grant of a rent charge for any estate he pleases, giving to the grantee a rent charge for a term of years, or for his life, or in tail, or in fee simple (*i*). For this purpose a *deed* is absolutely necessary; for a rent charge, being a separate incorporeal hereditament, cannot, according to the general rule, be created or transferred in any other way (*k*), unless indeed it be given by will. By an Act of 1855 any annuity or rent charge granted after the passing of the Act, otherwise than by marriage settlement or will, for a life or lives, or for any estate determinable on a life or lives, shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless registered, formerly in the Court of Common Pleas (*l*), and now in

(*d*) Litt. ss. 233, 241.

(*e*) *Ante*, p. 35.

(*f*) Litt. ss. 218, 233, 235, 236;
Co. Litt. 160 a; *ante*, p. 31.

(*g*) Stat. 3 & 4 Will. IV. c. 27,
s. 36; *ante*, p. 61, n.

(*h*) *Thomas v. Sylvester*, L. R.,
8 Q. B. 568; *Re Blackburn, &c.*,

Building Society, Ex parte Graham,
42 Ch. D. 343; *Searle v. Cooke*,
43 Ch. D. 519.

(*i*) Litt. ss. 217, 218.

(*k*) Litt. *ubi sup.*

(*l*) Stat. 18 & 19 Vict. c. 15,
ss. 12, 14; passed 26th April,
1855. Annuities for or deter.

the Central Office of the Supreme Court, against the name of the person, whose estate is intended to be affected (*m*). A search for annuities is accordingly made in this registry on every purchase of lands, in addition to the other usual searches (*n*). It has been decided, however, in accordance with the doctrines applied by the Courts of Equity in the construction of the Middlesex and Yorkshire Registry Acts (*o*), that rent charges are valid in equity against purchasers, who have *notice* of them, although they be not registered (*p*).

In settlements where rent-charges are often given by way of pin-money and jointure, they are usually created under a provision for the purpose contained in the Statute of Uses (*q*). The statute directs that, where any person shall stand seised of any lands, tenements, or hereditaments, in fee simple or otherwise, *to the use and intent* that some other person or persons shall have yearly to them and their heirs, or to them and their assigns, for term of life or years or some other special time, any annual rent, in every such case the same persons, their heirs and assigns, *that have such use* to have any such rent shall be adjudged and deemed in possession and seisin of the same rent of such estate as they had in the use of the rent; and they may distrain for non-payment of the rent in their own names. From

Creation of
rent charges
under the
Statute of
Uses.

minable on any life or lives, granted for valuable consideration, and not secured on lands of equal or greater value than the annuity and belonging to the grantor for an estate in fee or in tail in possession, were formerly made void by statute, unless a memorial thereof were duly enrolled in the Court of Chancery; stats. 17 Geo. III. c. 28; 53 Geo. III. c. 141; 3 Geo. IV. c. 92; 7 Geo. IV. c. 75. But as these annuities were only granted for the sake of

evading the Usury Laws (see 2 Black. Comm. 461), the same statute which repealed those laws also repealed the statutes above mentioned; stat. 17 & 18 Vict. c. 90.

(*m*) See Williams's Conveyancing Statutes, 268.

(*n*) *Ante*, p. 263.

(*o*) *Ante*, pp. 197, 239.

(*p*) *Greaves v. Tofield*, 14 Ch. D. 563.

(*q*) Stat. 27 Hen. VIII. c. 10, ss. 4, 5.

this enactment it follows, that if a conveyance of lands be now made to A. and his heirs,—*to the use* and intent that B. and his assigns may, during his life, thereout receive a rent charge,—B. will be entitled to the rent charge, in the same manner as if a grant of the rent charge had been duly made to him by deed. The above enactment, it will be seen, is similar to the prior clause of the Statute of Uses relating to uses of estates (*r*), and is merely a carrying out of the same design, which was to render every use, then cognizable only in Chancery, an estate or interest within the jurisdiction of the courts of law (*s*). But in this case, also, as well as in the former, the end of the statute has been defeated. For a conveyance of land to A. and his heirs, *to the use* that B. and his heirs may receive a rent charge, *in trust* for C. and his heirs, will now be laid hold of under the equitable doctrines of the Court of Chancery for C.'s benefit, in the same manner as a trust of an estate in the land itself. The statute vests the *legal estate* in the rent in B.; and C. takes no legal estate, because the trust for him would be a use upon a use (*t*). But C. has the entire beneficial interest; and he is possessed of the rent charge for an *equitable estate* in fee simple.

Clause of
distress.

In ancient times it was necessary, on every grant of a rent charge, to give an express power to the grantee to distrain on the premises out of which the rent charge was to issue (*u*). If this power were omitted, the rent was merely a *rent seek*. Rent service, being an incident of tenure, might be distrained for by common right; but rent charges were matters the enforcement of which was left to depend solely on the agreement of the parties. But since a power of distress has been

(*r*) *Ante*, p. 164.

(*s*) *Ante*, p. 167.

(*t*) *Ante*, p. 167.

(*u*) Litt. s. 218.

attached by Parliament (x) to rents seck, as well as to rents service, an express power of distress has not been necessary for the security of a rent charge (y). Such a power, however, was usually granted in express terms. In addition to the clause of distress, it was also usual, as a further security, to give to the grantee a power to enter on the premises after default had been made in payment for a certain number of days, and to receive the rents and profits until all the arrears of the rent charge, together with all expenses, should have been duly paid.

Power of
entry.

The following remedies are now given by the Conveyancing Act of 1881 (z), to any person entitled to a rent charge or any other annual sum, payable half-yearly or otherwise, not being rent incident to a reversion, charged upon any land, or the income thereof, by virtue of any instrument coming into operation after the year 1881:— (1) a power of distress, if the annual sum or any part thereof is unpaid for *twenty-one* days next after the time appointed for any payment in respect thereof; (2) a power, if the annual sum or any part thereof is unpaid for *forty* days next after the time appointed for any payment in respect thereof, to enter into possession of and hold the land charged or any part thereof, without impeachment of waste, and to take the income thereof, until all arrears due at the time of entry or afterwards becoming due and all expenses have been fully paid; (3) a power, in the like case, whether possession be taken or not, to demise by deed the land charged or any part thereof to a trustee

Statutory
powers of
distress,
entry, &c.

(x) Stat. 4 Geo. II. c. 28, s. 5; ante, p. 398. See *Johnson v. Faulkner*, 2 Q. B. 925, 935; *Miller v. Green*, 8 Bing. 92; 2 Cro. & Jerv. 142; 2 Tyr. 1.

(y) *Saward v. Anstey*, 2 Bing. 519; *Buttery v. Robinson*, 3 Bing. 392; *Dodds v. Thompson*, L. R.,

1 C. P. 133.

(z) Stat. 44 & 45 Vict. c. 41, s. 44, which applies only if and so far as a contrary intention is not expressed in the instrument, and has effect subject to its terms; sub-s. 5. See Williams's Conveyancing Statutes, 215—217.

for a term of years, upon trust to raise and pay all arrears due or to become due and all expenses. These statutory remedies are conferred, subject and without prejudice to all estates, interests and rights having priority to the annual sum, and only as far as they might have been conferred by the instrument under which the annual sum arises (*a*). Reliance upon this section has generally superseded the employment of express powers of distress and entry upon the grant of a rent charge (*b*).

Estate for life
in a rent
charge.

Incorporeal hereditaments are the subjects of estates analogous to those which may be holden in corporeal hereditaments. If therefore a rent charge should be granted for the life of the grantee, he will possess an estate for life in the rent charge. Supposing that he should alienate this life estate to another party, without mentioning in the deed of grant the heirs of such party, the law formerly held that, in the event of the decease of the second grantee in the lifetime of the former, the rent charge became extinct for the benefit of the owner of the lands out of which it issued (*c*). The former grantee was not entitled because he had parted with his estate; the second grantee was dead, and his heirs were not entitled because they were not named in the grant. Under similar circumstances, we have seen (*d*) that, in the case of a grant of corporeal hereditaments, the first person that might happen to enter upon the premises after the decease of the second grantee had formerly a right to hold possession during the remainder of the life of the former. But rents and other incorporeal hereditaments are not in their nature the subjects of occupancy (*e*); they do not lie exposed

(*a*) Sect. 44, sub-s. (1).

(*b*) See Williams's Conveyancing Statutes, 216, 217, 519.

(*c*) Bac. Abr. tit. Estate for

Life and Occupancy (B).

(*d*) *Ante*, p. 126.

(*e*) Co. Litt. 41 b, 388 a.

to be taken possession of by the first passer-by. It was accordingly thought that the statutes, which provided a remedy in the case of lands and other corporeal hereditaments, were not applicable to the case of a rent charge, but that it became extinct as before mentioned (*f*). By a modern decision, however, the construction of these statutes was extended to this case also (*g*); and now the Wills Act of 1837 (*h*), by which these statutes have been repealed (*i*), permits every person to dispose by will of estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or an incorporeal hereditament (*k*); and in case there shall be no special occupant, the estate, whether corporeal or incorporeal, shall go to the executor or administrator of the party; and coming to him, either by reason of a special occupancy, or by virtue of the Act, it shall be applied and distributed in the same manner as the personal estate of the testator or intestate (*l*).

The Wills Act, as to estates *pur autre vie*.

A grant of an estate tail in a rent charge scarcely ever occurs in practice. But grants of rent charges for estates in fee simple are not uncommon, especially in the towns of Liverpool and Manchester, where it is the usual practice to dispose of an estate in fee simple in lands for building purposes in consideration of a rent charge in fee simple by way of ground rent, to be granted out of the premises to the original owner. These transactions are accomplished by a conveyance from the vendor to the purchaser and his heirs, *to the use* that the vendor and his heirs may thereout receive the rent charge agreed on, [and *to the further use* that,

Estate in fee simple in a rent charge.

(*f*) 2 Black. Comm. 280.

(*g*) *Bearpark v. Hutchinson*, 7 Bing. 178.

(*h*) 7 Will. IV. & 1 Vict. c. 26.

(*i*) Sect. 2.

(*k*) Sect. 8.

(*l*) Sect. 6; *Reynolds v. Wright*, 25 Beav. 100.

if it be not paid within so many days, the vendor and his heirs may distrain, and *to the further use* that, in case of non-payment within so many more days, the vendor and his heirs may enter and hold possession till all arrears and expenses are paid ;] and subject to the rent charge, [and to the powers and remedies for securing payment thereof,] *to the use* of the purchaser, his heirs and assigns for ever. The words within brackets in the above sentence may now be omitted in reliance on the provisions of the Conveyancing Act of 1881, which have already been stated (*m*). The purchaser thus acquires an estate in fee simple in the lands, subject to a perpetual rent charge payable to the vendor, his heirs and assigns (*n*). It should, however, be carefully borne in mind, that transactions of this kind are very different from those grants of fee simple estates which were made in ancient times by lords of manors, and from which quit or chief rents have arisen. These latter rents are rents incident to tenure, and may be distrained for of common right without any express clause for the purpose. But as we have seen (*o*), since the passing of the statute of *Quia emptores* (*p*), it has not been lawful for any person to create a tenure in fee simple. The modern rents of which we are now speaking, are accordingly mere rent charges, and in ancient days would have required express clauses of distress to make them secure. They were formerly considered in law *as against common right* (*q*), that is, as repugnant to

Stamp duty.

(*m*) See *ante*, p. 397; Williams's Conveyancing Statutes, 217.

(*n*) By the Stamp Act, 1891 (stat. 54 & 55 Vict. c. 39, s. 56, replacing 33 & 34 Vict. c. 97, s. 72), where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically for a definite period, exceeding twenty years, or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be

charged in respect of that consideration with ad valorem duty on the total amount, which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of such instrument. For the duty imposed before 1871, see stat. 17 & 18 Vict. c. 83.

(*o*) *Ante*, p. 38.

(*p*) 18 Edw. I. c. 1.

(*q*) Co. Litt. 147 b.

the feudal policy, which encouraged such rents only as were incident to tenure. A rent charge was accordingly regarded as a thing entire and indivisible, unlike rent service, which was capable of apportionment. And from this property of a rent charge, the law, in its hostility to such charges, drew the following conclusion: that if any part of the land, out of which a rent charge issued, were released from the charge by the owner of the rent, either by an express deed of release, or virtually by his purchasing part of the land, all the rest of the land should enjoy the same benefit and be released also (*r*). If, however, any portion of the land charged should descend to the owner of the rent as heir at law, the rent would not thereby have been extinguished, as in the case of a purchase, but would have been apportioned according to the value of the land; because such portion of the land came to the owner of the rent, not by his own act, but by the course of law (*s*). But it is now provided (*t*), that the release from a rent charge of part of the hereditaments charged therewith shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the hereditaments released; without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release. The Board of Agriculture is now empowered by statute to apportion rents of every kind on the application of any persons interested in the lands and in the rent (*u*).

A release of part of the land was a release of the whole.

Apportionment on descent of part of the land.

New enactment; release not now an extinguishment.

Apportionment by Board of Agriculture.

The rent-charges, of which we are speaking, are usually further secured by a covenant for payment entered into by the purchaser in the deed by which they

Covenant to pay rent-charge.

(*r*) Litt. s. 222; *Dennett v. Pass*, 1 New Cases, 388.

(*s*) Litt. s. 224.

(*t*) Stat. 22 & 23 Vict. c. 35, s. 10; see *Booth v. Smith*, 14

Q. B. D. 318.

(*u*) Stats. 17 & 18 Vict. c. 97, ss. 10-14; 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30, s. 2.

are granted. And when the fee simple of a house or of building land is sold for a perpetual rent charge to issue thereout, the purchaser sometimes covenants to repair the house or to build on the land (*x*). But such covenants are merely personal covenants binding the purchaser and his representatives (*y*); and they cannot be enforced, either at law or in equity, against his assigns (*z*) of the land. For although, as we have seen (*a*), covenants by a tenant in fee restricting the use of the land are enforceable in equity against his assigns, who have notice of the covenants, this doctrine is not extended to covenants, which impose such an active duty as to repair or to lay out money on land (*b*). But the rent charge may be recovered by action, in the manner before explained, against the tenant of the freehold for the time being, whether he be the original purchaser, or his heir or his assign (*c*).

Bankruptcy
of owner of
land subject
to rent, &c.

The Bankruptcy Act, 1883 (*d*), provides for the disclaimer by the trustee for the creditors, within the time and under the conditions therein specified, of any part of the property of the bankrupt, which consists of land of any tenure burdened with onerous covenants, or of any other property that is not readily saleable, by

(*z*) Davidson, *Prec. Conv.* vol. ii. pt. i. pp. 504 *et seq.* 4th ed.; Key & Elphinstone, *Prec. Conv.* p. 282 n, 2nd ed.

(*y*) By stat. 22 & 23 Vict. c. 35, s. 28, where an executor or administrator liable under such covenants has satisfied all subsisting liabilities, and set aside a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum agreed to be laid out on the property, and has conveyed the property to a purchaser, he may distribute the residuary personal estate without appropriating any part thereof to meet any

future liability under such covenants. But this is not to prejudice the right to follow the assets of the deceased into the hands of the persons, amongst whom they may have been distributed.

(*a*) *Ante*, p. 72.

(*b*) *Ante*, p. 176.

(*b*) *Haywood v. Brunswick, &c., Building Society*, 8 Q. B. D. 403; *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750.

(*c*) *Ante*, p. 394, and cases cited in note (*A*).

(*d*) Stat. 46 & 47 Vict. c. 52, s. 55; see Williams on Personal Property, 203, 13th ed.

reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money (e). And the Court may make an order vesting any disclaimed property (without any conveyance for the purpose) in any person entitled thereto, or a trustee for him, on such terms as the Court thinks just.

Order vesting disclaimed property.

Although rent charges and other self-existing incorporeal hereditaments of the like nature are no favourites with the law, yet, whenever it meets with them, it applies to them, as far as possible, the same rules to which corporeal hereditaments are subject. Thus, we have seen that the estates which may be held in the one are analogous to those which exist in the other. So estates in fee simple, both in the one and in the other, may be aliened by the owner, either in his lifetime or by his will, to one person or to several as joint tenants or tenants in common (f), and, on his intestacy, will descend to the same heir at law. But in one respect the analogy fails. Land is essentially the subject of *tenure*; it may belong to a lord, but be holden by his tenant, by whom again it may be sub-let to another; and so long as rent is rent service, a mere incident arising out of the estate of the payer and belonging to the estate of the receiver, so long may it accompany, as accessory, its principal, the estate to which it belongs. But the receipt of a rent charge is accessory or incident to no other hereditament. True a rent charge springs from, and is, therefore, in a manner connected with, the land on which it is charged; but the receiver and owner of a rent charge has no shadow of interest beyond the annual payment, and in the abstract right to this pay-

Incorporeal hereditaments subject, as far as possible, to the same rules as corporeal hereditaments.

Tenure an exception.

(e) As to the effect of a disclaimer by a trustee in bankruptcy of freehold land subject to a rent charge and burdened with onerous covenants, see *Re Mercer and Moore*, 14 Ch. D. 287, decided

under the Bankruptcy Act, 1869, stat. 32 & 33 Vict. c. 71, ss. 23, 24.

(f) *Rivis v. Watson*, 5 M. & W. 255

ment his estate in the rent consists. Such an estate therefore cannot be subject to any tenure. The owner of an estate in a rent charge consequently owes no fealty to any lord, neither can he be subject, in respect of his estate, to any rent as rent service; nor, from the nature of the property, could any distress be made for such rent service if it were reserved (*g*). So, if the owner of an estate in fee simple in a rent charge should have died intestate, and without leaving any heirs, his estate could not escheat to his lord, for he had none. It simply ceased to exist, and the lands out of which it was payable were thenceforth discharged from its payment (*h*). The Intestate Estates Act, 1884 (*i*), now enacts that, from and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments (*k*). It appears to the editor that the Courts may find some difficulty in applying the law of escheat, in pursuance of this Act, to hereditaments which are not held of any lord.

Common in
gross.

Another kind of separate incorporeal hereditament which occasionally occurs is a right of common *in gross*. This is, as the name implies, a right of common over lands belonging to another person, possessed by a man, not as appendant or appurtenant to the ownership of any lands of his own, but as an independent subject of

(*g*) Co. Litt. 47 a, 144 a; 2 Black. Comm. 42. But it is said that the Queen may reserve a rent out of an incorporeal hereditament, for which, by her prerogative, she may distrain on all the

lands of the lessee. Co. Litt. 47 a, note (1); Bac. Abr. tit. Rent (B).

(*h*) Co. Litt. 298 a, n. (2).

(*i*) Stat. 47 & 48 Vict. c. 71, s. 4, passed 14th August, 1884.

(*k*) See *ante*, pp. 46, 52.

property (*l*). Such a right of common has, therefore, always required a deed for its transfer.

Another important kind of separate incorporeal here-^{Advowsons.} ditament is an advowson in gross. An advowson is a perpetual right of presentation to an ecclesiastical benefice. The owner of the advowson is termed the patron of the benefice: but, as such, he has no property or interest in the glebe or tithes, which belong to the incumbent. As patron he simply enjoys a right of nomination from time to time, as the living becomes vacant. And this right he exercises by a *presentation*^{Presentation.} to the bishop of some duly qualified clerk or clergyman, whom the bishop is accordingly bound to *institute*^{Institution.} to the benefice, and to cause him to be *inducted*^{Induction.} into it (*m*). When the advowson belongs to the bishop, the forms of presentation and institution are supplied by an act called *collation* (*n*). In some rare cases of advowsons^{Collation.} *donative*, the patron's deed of donation is alone suffi-^{Donatives.} cient (*o*). Where the patron is entitled to the advowson as his private property, he is empowered by an Act of Parliament of the reign of George IV. (*p*) to present^{Agreements for resignation.} any clerk under a previous agreement with him for his resignation in favour of any one person named, or in favour of one or two (*q*) persons, each of them being by blood or marriage, an uncle, son, grandson, brother, nephew or grand-nephew of the patron, or one of the patrons beneficially entitled. One part of the instrument by which the engagement is made must be deposited within two calendar months in the office of the

(*l*) 2 Black. Comm. 33, 34.

(*m*) 1 Black. Comm. 190, 191.

(*n*) 2 Black. Comm. 22.

(*o*) 2 Black. Comm. 23. By stat. 33 & 34 Vict. c. 97, every appointment, whether by way of donation, presentation or nomination, and admission, collation or institution to or licence to hold

any ecclesiastical benefice, dignity or promotion, or any perpetual curacy, was subject to an *ad valorem* duty, which was repealed by stat. 40 Vict. c. 13, s. 18.

(*p*) Stat. 9 Geo. IV. c. 94.

(*q*) The Acts reads one or two, but this is clearly an error.

registrar of the diocese (*r*), and the resignation must refer to the engagement, and state the name of the person for whose benefit it is made (*s*).

History of
advowsons
of rectories.

Advowsons are principally of two kinds,—advowsons of rectories, and advowsons of vicarages. The history of advowsons of rectories is in many respects similar to that of rents and of rights of common. In the very early ages of our history advowsons of rectories appear to have been almost always appendant to some manor. The advowson was part of the manorial property of the lord, who built the church and endowed it with the glebe and most part of the tithes. The seignories in respect of which he received his rents were another part of his manor, and the remainder principally consisted of the demesne and waste lands, over the latter of which we have seen that his tenants enjoyed rights of common as appendant to their estates (*t*). The incorporeal part of the property, both of the lord and his tenants, was thus strictly appendant or incident to that part which was corporeal; and any conveyance of the corporeal part naturally and necessarily carried with it that part which was incorporeal, unless it were expressly excepted. But, as society advanced, this simple state of things became subject to many innovations, and in various cases the incorporeal portions of property became severed from the corporeal parts, to which they had previously belonged. Thus we have seen (*u*) that the seignory of lands was occasionally severed from the corporeal part of the manor, becoming a seignory in gross. So rent was sometimes granted independently of the lordship or reversion to which it had been incident, by which means it at once became an independent incorporeal hereditament, under the name of a *rent seck*. Or a rent might

(*r*) Stat. 9 Geo. IV. c. 94, s. 4.

(*s*) Sect. 5.

(*t*) *Ante*, pp. 40, 388.

(*u*) *Ante*, p. 393.

have been granted to some other person than the lord, under the name of a *rent charge*. In the same way a *right of common* might have been granted to some other person than a tenant of the manor, by means of which grant a separate incorporeal hereditament would have arisen, as a *common in gross*, belonging to the grantee. In like manner there exist at the present day two kinds of advowsons of rectories: an advowson *appendant* to a manor, and an advowson *in gross* (x), which is a distinct subject of property, unconnected with any thing corporeal. Advowsons in gross appear to have chiefly had their origin in the severance of advowsons appendant from the manors to which they had belonged; and any advowson, now appendant to a manor, may at any time be severed from it, either by a conveyance of the manor, with an express exception of the advowson, or by a grant of the advowson alone independently of the manor. And when once severed from its manor, and made an independent incorporeal hereditament, an advowson can never become appendant again. So long as an advowson is appendant to a manor, a conveyance of the manor, even by feoffment, and without mentioning the appurtenances belonging to the manor, will be sufficient to comprise the advowson (y). But when severed, it must be conveyed, like any other separate incorporeal hereditament, by a deed of grant (z).

Origin of advowsons in gross.

Conveyance of an advowson.

The advowsons of rectories were not unfrequently granted by the lords of manors in ancient times to monastic houses, bishoprics and other spiritual corporations (a). When this was the case the spiritual patrons thus constituted considered themselves to be the most

History of advowsons of vicarages.

(x) 2 Black. Comm. 22; Litt. s. 617.

(y) Perk. s. 116; Co. Litt. 190 b, 307 a. See *Attorney-General v. Sitwell*, 1 You. & Coll. 559; *Hooper v. Harrison*, 2 Kay &

John. 86.

(z) Co. Litt. 332 a, 335 b; see Williams's Conveyancing Statutes, 72, 73.

(a) 1 Black. Comm. 384.

fit persons to be rectors of the parish, so far as the receipt of the tithes and other profits of the rectory was concerned; and they left the duties of the cure to be performed by some poor priest as their vicar or deputy. In order to remedy the abuses thus occasioned, it was provided by statutes of Richard II. (*b*), and Henry IV. (*c*), that the vicar should be sufficiently endowed wherever any rectory was thus *appropriated*. This was the origin of vicarages, the advowsons of which belonged in the first instance to the spiritual owners of the appropriate rectories as appendant to such rectories (*d*); but many of these advowsons have since, by severance from the rectories, been turned into advowsons in gross. And such advowsons of vicarages can only be conveyed by deed, like advowsons of rectories under similar circumstances.

Next presentation.

The church must be full.

Simony.

The sale of an advowson will not include the right to the *next presentation*, unless made when the church is full; that is, before the right to present has actually arisen by the death, resignation or deprivation of the former incumbent (*e*). For the present right to present is regarded as a personal duty of too sacred a character to be bought and sold; and the sale of such a right would fall within the offence of *simony*,—so called from Simon Magus,—an offence which consists in the buying or selling of holy orders, or of an ecclesiastical benefice (*f*). But, before a vacancy has actually occurred, the next presentation, or right of presenting at the next vacancy, may be sold, either together with, or independently of, the future presentations of which the advowson is composed (*g*), and this is frequently done. No spiritual person, however, may sell or assign any patronage or

(*b*) Stat. 15 Rich. II. c. 6.

(*c*) Stat. 4 Hen. IV. c. 12.

(*d*) Dyer, 351 a.

(*e*) *Alston v. Atlay*, 7 Adol. & Ellis, 289.

(*f*) Bac. Abr. tit. Simony; stats. 31 Eliz. c. 6; 28 & 29 Vict. c. 122, ss. 2, 5, 9.

(*g*) *Fox v. Bishop of Chester*, 6 Bing. 1.

presentation belonging to him by virtue of any dignity or spiritual office held by him, any such sale and assignment being void (*h*). And a clergyman is prohibited by a statute of Anne (*i*) from procuring preferment for himself by the purchase of a next presentation; but this statute does not prevent the purchase by a clergyman of an estate in fee or even for life in an advowson, with a view of presenting himself to the living (*k*). When the next presentation is sold, independently of the rest of the advowson, it is considered as mere personal property, and will devolve, in case of the decease of the purchaser before he has exercised his right, on his executors, and cannot descend to his heir at law (*l*). The advowson itself, it need scarcely be remarked, will descend, on the decease of its owner intestate, to his heir. The law attributes to it, in common with other separate incorporeal hereditaments, as nearly as possible the same incidents as appertain to the corporeal property to which it once belonged.

Tithes are another species of separate incorporeal hereditaments, also of an ecclesiastical or spiritual kind. In the early ages of our history, and indeed down to the time of Henry VIII., tithes were exclusively the property of the church, belonging to the incumbent of the parish, unless they had got into the hands of some monastery, or community of spiritual persons. They never belonged to any layman until the time of the dissolution of monasteries by King Henry VIII. But this monarch having procured Acts of Parliament for the dissolution of the monasteries and the confiscation of

(*h*) Stat. 3 & 4 Vict. c. 113, s. 42. *Bishop of Chester*, 10 Q. B. D. 407.

(*i*) Stat. 12 Anne, stat. 2, c. 12, s. 2. (*l*) See *Bennett v. Bishop of Lincoln*, 7 Barn. & Cress. 113; 8 Bing. 490.

(*k*) *Walsh v. Bishop of Lincoln*, L. R., 10 C. P. 518; *Lowe v.*

Tithes in lay hands.

Conveyances of tithes.

Descent of tithes.

their property (*m*), also obtained by the same Acts (*n*) a confirmation of all grants made or to be made by his letters-patent of any of the property of the monasteries. These grants were many of them made to laymen, and comprised the tithes which the monasteries had possessed, as well as their landed estates. Tithes thus came for the first time into lay hands as a new species of property. As the grants had been made to the grantees and their heirs, or to them and the heirs of their bodies, or for term of life or years (*o*), the tithes so granted evidently became hereditaments in which estates might be holden, similar to those already known to be held in other hereditaments of a separate incorporeal nature; and a necessity at once arose of a law to determine the nature and attributes of these estates. How such estates might be conveyed, and how they should descend, were questions of great importance. The former question was soon settled by an Act of Parliament (*p*), which directed recoveries, fines and conveyances to be made of tithes in lay hands, according as had been used for assurances of lands, tenements and other hereditaments. And the analogy of the descent of estates in other hereditaments was followed in tracing the descent of estates of inheritance in tithes. But as tithes, being of a spiritual origin, are a distinct inheritance from the lands out of which they issue, they have not been considered as affected by any particular custom of descent, such as that of gavelkind or borough-English, to which the lands may be subject, but in all cases they descend according to the course of the common law (*q*).

(*m*) Stat. 27 Hen. VIII. c. 28, intituled, "An Act that all Religious Houses under the yearly Revenue of Two Hundred Pounds shall be dissolved and given to the King and his heirs;" stat. 31 Hen. VIII. c. 13, intituled, "An Act for the Dissolution of all Monasteries and Abbeys;" and stat. 32 Hen. VIII. c. 24.

(*n*) 27 Hen. VIII. c. 28, s. 2; 31 Hen. VIII. c. 13, ss. 18, 19.

(*o*) Stat. 31 Hen. VIII. c. 13, s. 18; 32 Hen. VIII. c. 7, s. 1.

(*p*) Stat. 32 Hen. VIII. c. 7, s. 7.

(*q*) *Doe d. Lushington v. Bishop of Llandaff*, 2 New Rep. 491: 1 Eagle on Tithes, 16.

From this separate nature of the land and tithe, it also follows that the ownership of both by the same person will not have the effect of merging the one in the other. They exist as distinct subjects of property; and a conveyance of the land with its appurtenances, without mentioning the tithes, will leave the tithes in the hands of the conveying party (*r*). The Acts which have been passed for the commutation of tithes (*s*) affect tithes in the hands of laymen, as well as those possessed by the clergy. Under these Acts a rent-charge, varying with the price of corn, has been substituted all over the kingdom for the inconvenient system of taking tithes in kind; and in these Acts provision has been properly made for the *merger* of the tithes or rent-charge in the land, by which the tithes or rent-charge may at once be made to cease, whenever both land and tithes or rent-charge belong to the same person (*t*). By the Tithe Act, 1891 (*u*), tithe rent-charge is recoverable only under an order of the county court of the district, where the lands, out of which it issues, are situate; which order is to be executed by distress and entry, if the lands are occupied by the owner, but in any other case by the appointment of a receiver of the profits. Not more than two years' arrears can be so recovered (*x*). And no one is personally liable to the payment of a tithe rent-charge (*y*).

Tithes exist as distinct from the land.

Commutation of tithes.

Merger of tithes or rent charge in the land.

Remedies for the recovery of a tithe rent-charge.

(*r*) *Chapman v. Gatcombe*, 2 New Cases, 516.

(*s*) Stats. 6 & 7 Will. IV. c. 71; 7 Will. IV. & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 Vict. c. 7; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 14 & 15 Vict. c. 53; 16 & 17 Vict. c. 124; 21 & 22 Vict. c. 53; 23 & 24 Vict. c. 93; 26 & 27 Vict. c. 42; 41 & 42 Vict. c. 42; 43 & 49 Vict. c. 32; 49 & 50 Vict. c. 54.

(*t*) Stats. 6 & 7 Will. IV. c. 71, s. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict.

c. 73, s. 19.

(*u*) Stat. 54 Vict. c. 8, ss. 2, 9. By s. 1, any contract made between an owner and occupier of lands, after the passing of this Act, for payment of the tithe rent charge by the occupier shall be void. Tithe rent charge was previously recoverable only by distress and entry under stat. 6 & 7 Will. IV. c. 71, ss. 67, 81—85; *Barley v. Badham*, 30 Ch. D. 84.

(*x*) Stat. 6 & 7 Will. IV. c. 71, s. 81.

(*y*) Sect. 67; stat. 54 Vict. c. 8, s. 2 (9).

Titles of
honour.

Offices.

There are other species of incorporeal hereditaments which are scarcely worth particular notice in a work so elementary as the present, especially considering the short notice that has necessarily here been taken of the more important kinds of such property. Thus, *titles of honour*, in themselves an important kind of incorporeal hereditament, are yet, on account of their inalienable nature, of but little interest to the conveyancer. The same remark also applies to *offices* or places of business and profit. No outline can embrace every feature. Many subjects, which have here occupied but a single paragraph, are of themselves sufficient to fill a volume. Reference to the different works on these separate subjects here treated of must necessarily be made by those who are desirous of full and particular information.

PART III.

OF COPYHOLDS

Our present subject is one peculiarly connected with those olden times of English history to which we have had occasion to make so frequent reference. Everything relating to copyholds reminds us of the feudal manor, and the more ancient village community. Estates in copyhold are, however, essentially distinct, both in their origin and in their nature, from those freehold estates which have hitherto occupied our attention. Copyhold lands are lands holden by *copy* of court roll; that is, the muniments of the title to such lands are *copies* of the *roll* or book in which an account is kept of the proceedings in the *Court* of the manor to which the lands belong. For all copyhold lands belong to, and are parcel of, some manor. An estate in copyhold is not a freehold; but, in construction of law, merely an estate *at the will of the lord* of the manor, at whose will copyhold estates are expressed to be holden. Copyholds are also said to be holden *according to the custom* of the manor to which they belong, for custom is the life of copyholds (a).

Definition of copyholds.

Copyhold tenure grew out of tenure in villenage, as has been previously stated (b). The early history of tenure in villenage is lost in the obscurity which covers English institutions of early times after the settlement of the invaders from Germany (c). *Villenagium*, how-

Origin of copyholds.

Villenagium.

(a) Co. Cop. s. 32, Tr. p. 58.

(b) *Ante*, pp. 27, 40.

(c) See 1 Stubbs, Const. Hist. Chap. V.

ever, of which the word *villanage* is an adaptation, means either the tenure or the condition of a *villanus* (*d*). And the word *villanus*, as originally used, merely denoted a member of a *villa*, or village agricultural community; a villager, in fact (*e*). Now, the cultivation of land upon the common or open-field system of husbandry by the members of a village community was a feature of English life, which only disappeared within the first half of the present century (*f*). But to trace the origin of this common-field system of cultivation we are carried back to the earliest stages in the history of the occupation of land. A common field, in its last stage of development, may be shortly described as a large open field of arable land, divided into long strips which were held in severalty (*g*) by different owners. The field was cultivated in a rotation of crops determined by the rules of the community, which were founded on immemorial custom. The strips were not inclosed. And when the field lay fallow, each owner of a strip of land might put his cattle in to range over the whole field, in virtue of his right of common over the other strips (*h*). The earliest form of common-field husbandry seems to have been the common ploughing of waste land temporarily occupied by a tribal community, whose mode of life was pastoral rather than agricultural, and whose habits were migratory. The cultivation of land by a village community argues a permanent settlement upon the soil, and appears to belong to a later stage of social development (*i*). In our own island, we

A common field.

Tribal community

Village community.

(*d*) In Glanville (lib. 5) *villanagium* is used to denote the condition of a bondman (*nativus*); Bracton uses *villanagium* in the same sense (fo. 6 b), but also uses it to denote a holding in villanage, meaning either the tenure or the land held (see fo. 7, 26, 208 b).

(*e*) See Du Cange, Glossarium, sub verb.; Co. Litt. 5 b.

(*f*) See Williams on Com-

mons, 84—102; Seebohm, English Village Community, Chap. I. sect. 4; *ante*, p. 59.

(*g*) *Ante*, p. 185.

(*h*) See *ante*, pp. 40, 388; Williams on Commons, 67; Seebohm, Chap. I. sects. 1—3; Vinogradoff, Villainage in England, Essay II. Ch. I.

(*i*) Seebohm, pp. 369, 370.

find traces of the tribal system of cultivation remaining in Wales till after the Norman Conquest (*k*). But the inhabitants of the South-Eastern parts of Britain appear to have practised the cultivation of corn on land permanently occupied in times before the Roman invasion (*l*). When land has once been placed under permanent cultivation by agricultural settlements, it is often found that the shocks of national disturbance fail to break the continuity of cultivation (*m*). In Domesday-book the *maneria*, or agricultural estates, of which an account has been given in a previous chapter (*n*), are generally described as they existed in the time of King Edward as well as at the time of the survey. And, while we remember that the village communities of Domesday had been developed through more than five centuries under Saxon institutions, we must not forget that they were spread over land which had been tilled by the agricultural settlements of the ancient Britons and their Roman Conquerors. But the history of the growth of the *maneria*, which we find established in England under the last Saxon kings, is too obscure to be discussed in the pages of an elementary law book. We shall therefore take up tenure in villenage in the form which it had assumed after centuries of agriculture at the time of the Norman Conquest. As we have seen (*o*), the Domesday survey discloses a land covered with agricultural estates, each belonging to some freeholder, and cultivated in common fields by the *villani*, the inhabitants of the *villa* or *manerium* (*p*). As regards personal *status*, the *villanus* of the time of the Conquest appears to have been a free man (*q*); but the

Tenure in
villenage.

(*k*) Seebohm, Chap. VI.; see also Appendix F., *post*.

(*l*) See Seebohm, Chap. VII. s. 3.

(*m*) See Seebohm, Chap. XI. s. 2, as to local evidence of long continuity of English villages.

(*n*) *Ante*, p. 39.

(*o*) *Ante*, p. 39.

(*p*) See Seebohm, Chap. III.

(*q*) *Rectitudines Singularum Personarum*, Ancient Laws and Institutes of England, pp. 185, 186; Co. Litt. 5 b; Kemble, Saxons in England, Vol. I. pp. 215, 323; Stubbs, Const. Hist.

conditions, on which he held his land, bound him to constant labour on his lord's demesne (*r*). His holding, it will be remembered, consisted of a house and a certain number of strips of land scattered throughout the common fields of the vill (*s*). He possessed this land as the tenant of the owner of the estate, upon the condition of performing the services due in respect of his holding. These services were determined by local custom (*t*). They seem generally to have included certain payments in money and in kind; but the chief service of the *villanus* was to work for his landlord. He had to plough his landlord's demesne land, and to sow and to reap and to mow thereon, according to the time of year; and sometimes he had to do other work, as he was bid. But the amount of work which could be required from a *villanus* was regulated by custom, and seems to have varied a good deal in different places (*u*). Custom, it is thought, must also have controlled the transmission of the holding on the tenant's death (*x*).

Tenure in villenage in the thirteenth century.

Between the eleventh and thirteenth centuries a change appears to have taken place in the constitution of the *manerium*, and the legal position of its inhabitants. As we have seen (*y*), when it became im-

* *Yardland*.

§§ 37, 132, Vol. I. pp. 78, 426, 2nd ed.; Seebohm, pp. 127, 165; Vinogradoff, Villainage in England, 64—69, 135, 188—190, 218, 289. Note that the *Inquisitio Eliensis* (survey of the lands of the monks of Ely) was taken on the oaths "vicecomitis sciræ et omnium baronum et eorum francigenarum et totius centuriatus, presbyteri, præpositi, sex villani uniuscujusque villæ;" Domesday, iii. 497; Seebohm, p. 83; Stubbs, Select Charters, p. 86.

(*r*) *Ante*, pp. 40, 47 and n. (*f*).

(*s*) The holding of a *villanus* is very generally found to be a virgate or half a virgate of land. The Latin word *virgata* (a bundle of rods) is used to translate the

Saxon term *yardland*.* A virgate or yardland varied in extent; but, on an average, it appears to have comprised thirty acres, i. e., ten scattered acre-strips in each of the three common fields of the vill; See Seebohm, Chap. II. ss. 2—4; Vinogradoff, Villainage, 148, 239.

(*t*) See *Rectitudines Singularum Personarum*, Ancient Laws and Institutes of England, pp. 185—189.

(*u*) See Seebohm, Chap. II. ss. 5—12; Ch. V. ss. 2, 4, 6, 7; Vinogradoff, Villainage, pp. 297—300.

(*x*) See Seebohm, pp. 76, 77, 176, 177; *ante*, p. 18, n. (*y*).

(*y*) *Ante*, pp. 14, 15, 48.

Virgata.

portant to determine what landholders should have their possession protected by the special remedy given in the King's Court, all the old English forms of landholding were submitted to the classifying action of a general judge-made law. Thus the possession of the free sokemen, whose services were fixed and lighter than those of ordinary villagers, was allowed to be their own. So that socage came to be a species of freehold tenure, including all who held by certain but not military service (*z*). But the more burdensome conditions of occupation incumbent on the ordinary *villanus* were held to be servile (*a*); and he was not allowed to claim in the King's Court the possession of his holding as his own (*b*). Tenure in villenage was thus placed outside the pale of property protected by law. By the middle of the thirteenth century, the *manerium* of Domesday has become a feudal manor, of which the most important tenants are the freeholders in knight's service or socage (*c*); while the position of the *villani* is not only degraded by denial of protection in the King's Court, but is further complicated with questions of personal *status*. The law of the thirteenth century is stated by Bracton. In his treatise, tenure in villenage, with its labour-services, is contrasted with free tenure by military service or in socage; and it appears that the tenant in villenage may be either a free

Bracton's
account of
tenure in
villenage.

(*a*) *Ante*, pp. 47—49.

(*a*) Vinogradoff, Villainage, 81—83, 215, 216.

(*b*) *Ante*, p. 17 and note (*n*).

(*c*) *Ante*, pp. 41, 42, 48. It is not clear how this change took place. No doubt it resulted partly from grants of land out of the lord's demesne to be held freely, partly too from the enfranchisement (or grant to be held freely) of land formerly held in villenage. Professor Vinogradoff shows, however, that there are instances of thirteenth century freeholds, of which the origin cannot well be

attributed either to grant or enfranchisement. These, he suggests, cannot be explained except as free land, which was originally an integral part of the land tilled by the village. See Vinogradoff, Villainage, Essay II. Ch. IV.; see also pp. 121 *et seq.*; Bract. fo. 7, 26 a, 209 a; Britton, liv. 3, ch. 2, §§ 7, 8; stat. *Extenta Manerii*, Statutes of the Realm, i. 242; Seebohm, Ch. III. s. 3; Cartulary of the Abbey of Ramsey (Rolls ed.), i. 286, 287, 297, 334, 370, 440 (instances of enfranchisement).

man or a bondman (*d*). The meaning of the word *villanus* has also been modified; and it is used to denote either a tenant in villenage (whether bond or free), or one who is in personal condition a bondman (*e*). Bracton (*f*) describes tenure in villenage as being either absolute (*purum*) or privileged. The tenant in absolute villenage holds by uncertain and unlimited services; he has to do what he is bid, may be taxed at the will of the lord, and has to pay the *merchetum*, or fine for the privilege of giving his daughter in marriage. The burthen of the *merchetum* is incident to the *status* of a bondman only, and not to that of a free man. But a free man may hold land in absolute villenage; and in such a case he must perform the services, if he wish to continue in the occupation of his holding. And if a free man paid the *merchetum*, he would pay it as an incident of his tenure, and not of his *status* (*g*). Privileged villenage is to hold land under an agreement with the lord at fixed services of a servile nature, which are determined by the agreement. Either a free man or a bondman can hold in this way. Tenant in villenage holds possession in the name and at the will of his lord, who is seised of land held of him in villenage in his demesne (*h*). If a tenant in villenage be ejected by any other than his landlord, the King's Court does not recognize that he has any right of his own to recover possession of his holding (*i*). If a tenant in absolute villenage be ejected by his landlord, the law, regarding him strictly as tenant at his lord's will, does not recognize that he has any right to recover possession. Still, a free man holding in absolute villenage ought not

Merchetum.

Privileged
villenage.

(*d*) Bracton, fo. 207 a, 208 b.

(*e*) See Bracton, fo. 208 b, where he also uses the word *servus* in speaking of the personal *status* of a bondman; see also fo. 4 b, 6 b; Co. Litt. 5 b. In Glanville (lib. 5) a bondman is called *nativus*.

(*f*) Fo. 7, 26, 208 b.

(*g*) Bracton, fo. 199 b, 200 a; see *ante*, p. 16 and n. (*h*).

(*h*) Bract. fo. 263 a; *ante*, p. 35.

(*i*) Bract. fo. 7 a, 26 b, 168 a, 190, 197 b, 207 a, 208 b, 210 b, 278 b.

to be ejected, whilst he performs the customary services. A tenant in privileged villenage of the kind above mentioned acquires by the agreement a right to sue his lord personally, in virtue of which he may possibly recover possession, if ousted by the lord (*k*). Another kind of privileged villenage is the tenure called *villanum socagium*, which is the tenure of those who hold land of manors in the ancient demesne of the Crown (*l*) by fixed services of a servile nature. Such tenants can not be ejected, so long as they perform their services; nor can they be compelled to remain in the occupation of their holdings, and therefore they are called free. But their possession is not protected in the King's Court, but only by a special royal writ in the manorial court. And they cannot alien their tenements by gift (*m*), or transfer them to others, any more than bondmen can; and therefore if their holdings are to be transferred, they surrender them to the lord or his steward, who delivers them to others to hold in villenage.

Practically, however, the tenant in absolute villenage of the thirteenth century was placed in a more favourable position than was accorded to him by King's Court law. In everyday life the will of the lord was, as a rule, controlled by custom. And what is more, the humblest villager had some security against the invasion of his customary rights in the manorial court, of which the findings were originally those of the whole body of villagers, whether bond or free (*n*). Thus the services required of the tenant in villenage were those accustomed to be rendered in respect of his holding;

(*k*) Bract. fo. 24 b, 26 b, 168 b, 190, 199 b, 200 a, 208 b, 209 a. See Vinogradoff, Villainage, 70—74, 77—81.

(*l*) *Ante*, p. 57.

(*m*) See *Ante*, p. 140.

(*n*) Maitland, Select Pleas in Manorial Courts (Selden Society, vol. 2), Introd. ix. *et seq.*, 168, 184; Vinogradoff, Villainage, Essay II. Ch. V., Selden Society, iv. 110.

and these were described, with extreme minuteness, in the manorial extents or surveys, which were drawn up for the guidance of the lord, but on the evidence of the villagers themselves (*o*). The possession of a tenant in villenage appears to have been protected in the manorial court against all persons other than the lord (*p*). And in many cases the lords submitted to such dealings with lands holden of them in villenage as showed or founded a custom of hereditary succession to the tenancy, or alienation by the tenant (*q*).

Growth of the
law of copy-
hold tenure.

The law of copyhold tenure seems to have grown up as the customs, which regulated the holding of land in villenage, developed into rights, and personal bondage died out. Copyhold tenure appears to have gained ground with progress varying according to the customs and circumstances of particular manors and districts. Commutation of the labour services for money rents was doubtless one of the chief causes of the change from tenure in villenage to copyhold tenure; and this commutation appears to have been made at different periods in different parts of the country (*r*). The tenure came to be called copyhold, because the tenants had no other evidence of title, save copies of the Court rolls (*s*). For the customs relating to the holdings of the tenants in villenage were proved by the entries made in the rolls, which formed the records of the proceedings of the Manorial Court (*t*). These records are the Court rolls, which alone can furnish evidence of the custom, by virtue of which the copyholder claims

Court rolls.

(*o*) Vinogradoff, Villainage, 212—215, 278, 297—300, 355.

(*p*) *Ante*, p. 17, n. (*n*).

(*q*) Vinogradoff, Villainage, 165—167, 172; Rot. Hund. ii. 403, 669, 768, 770, 771; Ramsey Cartulary (Rolls Series), i. 372, 411, 416, 432, 477.

(*r*) Vinogradoff, Villainage, 139, 167—172, 178—188, 216, 306—

310.

(*s*) Litt. s. 75.

(*t*) See Seebohm's account of the Court Rolls of the Manor of Wincelaw during the reign of Edward III.; Eng. Vill. Community, pp. 20—32; Vinogradoff, Villainage, 173, 374; Selden Society, iv. 112.

his estate; and copies of the entries made therein were given to the tenants and kept by them as muniments of title (*u*). Originally, as we have seen, the whole village community was represented in one Manorial Court (*x*). But according to later law (*y*), the Court Baron of a manor, in which the freeholders were suitors and judges (*z*), is distinguished from the Court held for the customary tenants; the latter being called a Customary Court, and the lord only, or his steward, being judge therein.

Littleton, who wrote in the reign of Edward IV., describes (*a*) tenant by copy of Court roll as holding lands in fee simple, fee tail, or for life at the will of the lord, according to the custom of the manor, in virtue of an immemorial custom within that manor, that lands should be so held. He shows how such tenants may have estates of inheritance by the custom, though they have no freehold at common law (*b*); and describes the manner in which it is customary for them to alienate their holdings (*c*). Littleton, however, also mentions (*d*) tenure in villenage as being most properly when a villein holdeth of a lord, to whom he is a villein, certain lands according to the custom of the manor, or otherwise, at the will of the lord, and to do to his lord villein service, as to carry out the dung of his lord and spread it on the lord's land, and such like. And he says that some free men hold their tenements according to the custom of certain manors by such services; and their tenure is also called tenure in villenage, and yet they are not villeins; for no land holden in villenage, or villein land, nor any custom arising out of the land, shall ever make a free man villein. It appears from this passage, that

(*u*) Co. Litt. 58 a.

(*x*) *Ante*, p. 419.

(*y*) Co. Litt. 58 a; 2 Wat. Cop. 4, 5; 1 Scriv. Cop. 5, 6, 8d ed.

(*z*) *Ante*, pp. 42, 45.

(*a*) Sect. 73.

(*b*) Sects. 76, 77, 81, 82.

(*c*) Sects. 74, 78, 79.

(*d*) Sect. 172.

Customary
Court.

Littleton's
account of
copyhold
tenure and
villenage.

in Littleton's time the word *villanus* or villein had almost entirely lost its old meaning (*e*), and was generally used to signify a bondman (*f*). It may also be inferred from Littleton's treatise that, in his time, copyhold tenure had partially, but not altogether, superseded tenure in villenage. With the extinction of personal bondage after Littleton's day (*g*), the term *tenure in villenage* seems to have become obsolete; and the tenure itself has survived only in the form of copyhold tenure.

Copyhold
estates.

The estates for which land may be holden in copyhold tenure, and the modes of alienation thereof and succession thereto, are the outgrowth of local customs, which in many cases are doubtless of great antiquity (*h*). In these matters the law is now determined by the custom of each particular manor. In those manors, in which it was the custom that the heir of a tenant in villenage should be admitted to succeed to his ancestor's holding, the interest of the copyholders developed into customary *estates* of inheritance analogous to freehold estates. Such estates descend, not to the heirs at common law, but to the customary heirs (*i*); that is, to those relations of a deceased tenant, who by the custom of the manor have from time immemorial been admitted to succeed to his holding as his heirs. Sometimes the customary course of descent is analogous to the course of descent prescribed by law in the case of freeholds.

Copyholds of
inheritance.

Villeins re-
gardant or in
gross.

(*e*) See *ante*, pp. 414, 418.

(*f*) Littleton (sects. 181—188), describes villeins as being either *regardant* or *in gross*. Villeins regardant were annexed to a manor, and would pass by a conveyance thereof; for the transfer of villeins in gross a deed was always required. It may be interesting to the student of analytical jurisprudence to note that a villein was a purely incorporeal hereditament; see Litt. sects. 175, 181—185; Co. Litt. 121 b;

ante, p. 386.

(*g*) See 3 Hallam, *Midd. Ages*, 271; Smyth, *De Republica Anglorum*, 107, 108, ed. 1588; Doctor & Student, Dial. II. Ch. XVIII.

(*h*) See Pollock, *Land Laws*, App. C.; Elton, *Origins of English History*, Ch. VIII.; Elton, *Custom and Tenant Right*, App. D.

(*i*) *Doe d. Garrod v. Garrod*, 2 B. & Ad. 87.

But in many cases quite a different course of descent is prescribed by the custom of the manor (*k*). The memory of the time when the tenant's heir was admitted to succeed by virtue of a custom only, and not as of right, is preserved by the fine, which the lord is generally entitled to exact on the heir's admission. And the form of transfer by favour of the lord is also preserved in the mode of alienation of such estates; for the copyholder cannot convey his estate directly to another, but must *surrender* his holding to his lord, who will then *admit* the alienee to be his tenant as the customary services on payment at the customary fine (*l*).

In the Midland and South-Eastern counties the prevailing customs have admitted of copyhold estates of inheritance analogous to freehold estates. But in some manors within those counties, and in other parts of the country (*m*), the copyhold tenant is admitted to hold for his own life only, or for the lives of himself and another or others, or for a term of years only. In such cases, he may, by virtue of an immemorial custom, have the right either to nominate his successor, or to renew the lives or the term on payment of a certain fine: but otherwise he will have no right of renewal (*n*).

It was long before the estates of copyholders were secured to them by clearly defined rights, which could be enforced in the King's Courts (*o*), instead of by custom. In the reign of Edward III. a case occurred in which the entry of a lord on a tenant by copy of Court roll was adjudged lawful, because the tenant did not do his services, by which he broke the custom of

Copyholds for
lives, &c.

Progress of
the develop-
ment of copy-
holders' rights.

(*k*) See 2 Wat. Cop. App. III., 4th ed.; *Re Smart*, 18 Ch. D. 165.

(*l*) Litt. s. 74; see Vinogradoff, Villainage in England, 371 *et seq.*

(*m*) Chiefly in the West of England.

(*n*) See 1 Scriv. Cop. 422—427,

3rd ed.; Watkins on Copyholds, 4th ed. Vol. I. pp. 62, n., 71, n., 122, n., 372—374; Vol. II. p. 214, n., and App. III.; Elton, Custom and Tenant Right, pp. 81, 82, 63—72, and App. C.

(*o*) *Ante*, p. 9 and n.

the manor (*p*). This seems to show that the lord could not, at that time, have ejected his tenant without cause (*q*). In the reign of Henry VI. it was said that a tenant by copy of Court roll should have a remedy in Chancery against his lord who ousted him (*r*). And in the reign of Edward IV. the right of the copyholder to enjoy his customary estate, as against his lord, was struggling into definite recognition at law. For Littleton says that the lord cannot break the custom, by which the copyhold tenant enjoys his estate (*s*), and may in some case be barred by the custom in an action of trespass against him (*t*). While other judges suggested that a copyholder might have an action of trespass against a lord who unjustly deprived him of possession (*u*). These opinions ultimately prevailed (*x*).

As against other persons than the lord, the estate of the copyholder seems to have been earlier secured to him, as of *right*. But he was not protected by the King's writ, for he could only assert his rights in the lord's Court by proceedings in the nature of real actions according to the custom of the manor (*y*). And he could not appeal from the judgment of the lord to the King's Courts of Law; but his only remedy against the false judgment of the lord was in the nature of a petition in Chancery (*z*). Copyholders' rights were finally secured in the reign of Elizabeth, when it was decided (*a*) that a copyholder might recover posses-

(*p*) Year Book, 42 Edw. III. 25, pl. 9.

(*q*) 4 Rep. 21 b.

(*r*) Fitz. Abr. tit. Subpœna, pl. 21; *Andrews v. Hulse*, 4 K. & J. 392.

(*s*) Litt. ss. 77 (of which the latter half is of doubtful authenticity), 82—84, 187.

(*t*) Sect. 82.

(*u*) Year Book, 7 Edw. IV. 18, pl. 16; 21 Edw. IV. 80, pl. 27.

(*x*) Co. Cop. a. 9; Bac. Uses, 20.

(*y*) See *ante*, p. 420; 18 Ric. II.

Fitz. Abr. tit. Faux Judgment, pl. 7; Year Book, 2 Hen. IV. 12, pl. 49; 1 Hen. V. 11, pl. 24; 4 Rep. 21 b.; Litt. s. 76; 1 Scriv. Cop. 562 *et seq.* 3rd ed.

(*z*) See Fitz. Abr. *ubi sup.*; Year Book, 14 Hen. IV. 34, pl. 51; 4 Rep. 30 b.; *Pattishall's case*, 4 Vin. Abr. 385; *Edward's case*, Lane, 98; *Ash v. Rogle*, 1 Vern. 367; Co. Litt. 60 a; 1 Scriv. Cop. 582, 3rd ed.

(*a*) *Melwich v. Luter*, 4 Rep. 26 a; see 1 Scriv. Cop. 553 *et seq.* 3rd ed.

sion of his holding, from his lord as well as from a stranger, in an action of ejectment, which he could bring at common law. For this action was in form founded upon a *lease* for a year made by the copyholder, which was good at common law, and the *ejectment* of the lessee after *entry* (*p*).

Copyhold estates thus acquired the essential quality of ownership; and, as we have seen, are now included in what is called real property, as well as freeholds (*o*).

(b) *Ante*, p. 61, n. (g).

(o) *Ante*, pp. 2, 27.

CHAPTER I.

OF ESTATES IN COPYHOLDS.

Estates in
copyhold.

An estate at
will.

WITH regard to the estates which may be holden in copyholds, in strict legal intendment a copyholder can have but one estate; and that is an estate at will, the smallest estate known to the law, being determinable at the will of either party. For though custom has now rendered copyholders independent of the will of their lords, yet all copyholds properly so called, are still expressly stated, in the Court rolls of manors, to be holden at the will of the lord (*a*); and, more than this, estates in copyhold are still liable to some of the incidents of a mere estate at will. We have seen that in the thirteenth century the occupants of land in villenage, however much they may have been protected from disturbance by force of custom, were regarded by the law of the King's Court as mere tenants at the will of the freeholder of a manor, having no independent right of their own to the possession of their holdings; and further that it was considered that the lord was seised in his demesne of all land occupied by his tenants in villenage (*b*). In other words, the lands held by such tenants, who afterwards came to be called copyholders, still remained part and parcel of the lord's manor; and the freehold of these lands still continued vested in the lord. And this is the case at the present day with regard to all copyholds. The lord of the manor is actually seised of all the lands in the possession of his copyhold tenants (*c*). He has not a mere incorporeal seignory

The lord is
actually seised
of all the
copyhold
lands of his
manor.

(*a*) 1 Watk. Cop. 44, 45; 1
Serv. Cop. 605.

(*b*) *Ante*, p. 418.

(*c*) Watk. Descents, 51 (59,
4th ed.)

over those as he has over his freehold tenants, or those who hold of him lands, once part of the manor, but which were anciently granted to be held for estates in fee simple by free tenure (*d*). Of all the copyholds he is the feudal possessor; and the seisin he thus has is not without its substantial advantages. The lord having a legal estate in fee simple in the copyhold lands, possesses all the rights incident to such an estate (*e*), controlled only by the custom of the manor, which is now the tenant's safeguard. Thus he possesses a right to all *mines* and *minerals* under the lands (*f*), and also to all *timber* growing on the service, even though planted by the tenant (*g*). These rights, however, are somewhat interfered with by the rights which custom has given to the copyhold tenants; for the lord cannot come upon the lands to open his mines, or to cut his timber, without the copyholder's leave. And hence it is that timber is so seldom to be seen upon lands subject to copyhold tenure (*h*). Again, if a copyholder should grant a lease of his copyhold lands, beyond the term of a year, without his lord's consent, such a lease would be a cause of forfeiture to the lord, unless it were authorized by a special custom of the manor (*i*). For such an act would be imposing on the lord a tenant of his own lands, without the authority of custom; and custom alone is the life of all copyhold assurance (*k*). So a copyholder cannot *Waste*.

The lord has a right to mines and timber.

Lease of copyholds.

(*d*) *Ante*, p. 386.

(*e*) *Ante*, p. 62.

(*f*) 1 Waik. Cop. 332; 1 Scriv. Cop. 25, 508. See *Bowser v. Maclean*, 2 De G., F. & J. 415; *Eardley v. Granville*, 8 Ch. D. 826.

(*g*) 1 Watk. Cop. 332; 1 Scriv. Cop. 499.

(*h*) There is a common proverb, "The oak scorns to grow except on free land." It is certain that in Sussex and in other parts of England the boundaries of copyholds may be traced by the entire absence of trees on one side of a

line, and their luxuriant growth on the other. 8rd Rep. of Real Property Commissioners, p. 15.

(*i*) 1 Watk. Cop. 327; 1 Scriv. Cop. 544; *Doe d. Robinson v. Boufield*, 6 Q. B. 492.

(*k*) *By the licence of his lord, * Lease of a copyholder may grant a lease copyholds by for any term warranted by the licence of the licence. Such a lease takes effect lord. at common law out of the seisin of the freeholder of the manor, who cannot, therefore, authorize, a longer lease than is warranted by his own estate in the manor, or some power given to him by a

commit any waste either voluntary, by opening mines, cutting down timber or pulling down buildings or permissive, by neglecting to repair. For the land, with all that is under it or on it, belongs to the lord: the tenant has nothing but a customary right to enjoy the occupation; and if he should in any way exceed this right, a cause of forfeiture to his lord would at once accrue (*l*). Copyholders are thus placed in a far less advantageous position than freeholders as regards the right of free enjoyment (*m*).

Customary
freeholds.

The freehold
is in the lord.

A peculiar species of copyhold tenure prevails in the north of England, and is to be found also in other parts of the kingdom, particularly within manors of the tenure of ancient demesne (*n*); namely, a tenure by copy of Court roll, but not expressed to be at the will of the lord. The lands held by this tenure are denominated customary freeholds. This tenure has been the subject of a great deal of learned discussion (*o*); but the Courts of law have now decided that, as to these lands, as well as pure copyholds, the freehold is in the lord, and not in the tenant (*p*). Customary freeholds afford another instance of the classifying action of a general law imposed on tenures of different origin and history (*q*). On manors of ancient demesne, customary tenants, who have not the freehold, appear

settlement or by statute. By the Settled Land Act, 1882 (stat. 45 & 46 Vict. c. 88, s. 14), a tenant for life under a settlement may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land (*ante*, p. 114). See Williams's Conveyancing Statutes, 814—817.

(*l*) 1 Watk. Cop. 381; 1 Scriv.

Cop. 526. See *Doe d. Grubb v. Earl of Burlington*, 5 B. & Ad. 507.

(*m*) *Ante*, pp. 2, 75.

(*n*) Britt. 184 b, 165 a. See *ante*, p. 57.

(*o*) 2 Scriv. Cop. 665.

(*p*) *Stephenson v. Hill*, 3 Burr. 1278; *Burrell v. Dodd*, 3 Bos. & Pul. 878; *Doe d. Keay v. Huntington*, 4 East, 271; *Doe d. Cook v. Danvers*, 7 East, 299; *Thompson v. Hardings*, 1 C. B. 840.

(*q*) *Ante*, pp. 14, 15, 43, 49.

to be the successors of former tenants in pure villenage; a class found on the ancient demesne of the Crown, as well as those who held by the privileged villein tenure called *villanum socagium* (*r*). The tenures of the North have a history of their own (*rr*). And the so-called customary freeholders of the Northern counties appear to be the successors of those who, before the union of England and Scotland, held land by doing services for the protection of the border (*s*), and to whom long custom had secured an acknowledged tenant-right in their holdings (*t*). On lands held by copy of Court roll, though not expressly at the will of the lord, the right to mines and timber belongs to the lord in the same manner as on other copyhold lands (*u*). Neither can the tenants generally grant leases without the lord's consent (*x*). The lands are, moreover, said to be *parcel* of the manors of which they are held, denoting that in law they belong, like other copyholds, to the lord of the manor, and are not merely *held of* him, like the estates of the freeholders (*y*). In law, therefore, the estates of these tenants cannot, in respect of their lords, be regarded as any other than estates at will, though this is not now actually expressed. If there should be any customary freeholds in which the above characteristics, or most of them, do not exist, such may with good reason be regarded as the actual freehold

Freehold in
the tenant.

(*r*) *Ante*, pp. 57 and n. (*k*), 419; Bract. fo. 7, 209 a; Britton, liv. 3, ch. 2, §§ 11, 12; F. N. B. 12, 14; Vinogradoff, Villainage in England, 112—122.

(*rr*) See an article on Northumbrian Tenures by Professor Maitland, English Historical Review, v. 625.

(*s*) See Nicolson's Border Laws, xxxiii. and App. No. 8.

(*t*) Co. Cop. s. 32; Moore, 588; *Champion v. Atkinson*, 3 Keb. 90; *Duke of Somerset v. France*, Stra. 654, 657; *Doe d. Reay v. Huntington*, 4 East, 288; *Brown v.*

Rawlins, 7 East, 409; Manning's Exch. Practice, 359, 363, 2nd ed.; Third Rep. of Real Prop. Comms., 20; Elton, Custom & Tenant Right, 32 *et seq.*, and App. E.

(*u*) 3 Burr. 1277, *arguendo*; *Doe d. Reay v. Huntington*, 4 East, 271, 278; *Brown v. Rawlins*, 7 East, 409; *Duke of Portland v. Hill*, L. R., 2 Eq. 765.

(*x*) *Doe v. Danvers*, 7 East, 299, 301, 314.

(*y*) *Burrell v. Dodd*, 8 Bos. & Pul. 378, 381; *Doe v. Danvers*, 7 East, 320, 321.

estates of the tenants. The tenants would then possess the rights of other freeholders in fee simple, subject only to a customary mode of alienation. That such a state of things may, and in some cases does, exist, is the opinion of some very eminent lawyers (2). But a recurrence to first principles seems to show that the question, whether the freehold is in the lord or in the tenant, is to be answered, not by an appeal to learned *dicta* or conflicting decisions, but by ascertaining in each case whether the well-known rights of freeholders, such as to cut timber and dig mines, are vested in the lord or in the tenant.

Copyholders, when admitted, in a similar position to freeholders having the seisin.

It appears then, that with regard to the lord, a copyholder is only a tenant at will. But a copyholder, who has been admitted tenant on the Court rolls of a manor, stands, with respect to other copyholders, in a similar position to a freeholder who has the seisin. The legal estate in the copyholds is said to be *in* such a person in the same manner as the legal estate of freeholds belongs to the person who is seised. The necessary changes which are constantly occurring of the persons who from time to time are tenants on the rolls, form occasionally a source of considerable profit to the lords. For by the customs of manors, on every change of tenancy, whether by death or alienation, fines of more or less amount become payable to the

Fines.

(2) Sir Edward Coke, Co. Litt. 59 b; Co. Cop. sect. 32, Tracts, p. 68; Sir Matthew Hale, Co. Litt. 59 b, n. (1); Sir W. Blackstone, Considerations on the Question, &c.; Sir John Leach, *Bingham v. Woodgate*, 1 Russ. & Mylne, 32; 1 Tamlyn, 138. Tenements within the limits of the ancient borough of Kirby-in-Kendall, in Westmoreland, appear to be an instance; *Busher app., Thompson*, resp., 4 C. B. 48.

The freehold is in the tenants, and the customary mode of conveyance has always been by deed of grant, or bargain and sale without livery of seisin, lease for a year, or inrolment. Some of the judges, however, seemed to doubt the validity of such a custom. See also *Perryman's case*, 5 Rep. 84; *Passingham app., Pitty*, resp., 17 C. B. 299; *Wadmore v. Tollar*, 6 Times L. k. 58.

lord. By the customs of some manors the fine payable was anciently arbitrary; but in modern times, fines, even when arbitrary by custom, are restrained to two years' improved value of the land after deducting quit rents (a). Occasionally a fine is due on the change of the lord; but, in this case, the change must be by the act of God and not by any act of the party (b). The tenants on the rolls, when once admitted, hold customary estates analogous to the estates which may be holden in freeholds (c). These estates of copyholders are only *quasi* freeholds; but as nearly as the rights of the lord and the custom of each manor will allow, such estates possess the same incidents as the freehold estates of which we have already spoken. Thus there may be copyhold estates in fee simple, in tail, or for life only; and some manors admit of no other than life estates, the lives being continually renewed as they drop (d). And in those manors in which estates of inheritance are allowed, a grant to a man simply, without expressly extending the benefit thereof to his heirs, will confer only a customary estate for his life (e). But, as the customs of manors are very various, in some manors the words "to him and his," or "to him and his assigns," or "to him and his sequels in right," will create a customary estate in fee simple, although the word *heirs* (or the words *in fee simple* after the year 1881) may not be used (f).

The same free and ample power of alienation, which belongs to an estate in fee simple in freehold lands, appertains also to the like estate in copyholds. The liberty of alienation *inter vivos* appears, as to copyholds, to have had little, if any, precedence, in point of time, over the liberty of alienation by will. Both were, no

(a) 1 Scriv. Cop. 384.

(b) 1 Watk. Cop. 286.

(c) See *ante*, p. 423.

(d) See *ante*, p. 423.

(e) Co. Cop. s. 49, Tr. p. 114.
See *ante*, pp. 105, 141, 194.

(f) 1 Watk. Cop. 109; see
ante, pp. 141, 193.

doubt, at first secured merely by local custom, which subsequently ripened into a right (*g*).

Estate tail in copyholds.

An estate tail in copyholds stands upon a peculiar footing, and has a history of its own, which we shall now endeavour to give (*h*). This estate, it will be remembered, is an estate given to a man and the heirs of his body. With regard to freeholds, we have seen that, in an early period of our history, a right of alienation appears gradually to have grown up, empowering every freeholder, to whose estate there was an expectant heir, to disinherit such heir, by gift or sale of the lands. A man, to whom lands had been granted to hold to him and the heirs of his body, was accordingly enabled to alien the moment a child or expectant heir of his body was born to him; and this right of alienation at last extended to the possibility of reverter belonging to the lord, as well as to the expectancy of the heir (*i*); till at length it was so well established as to require an Act of Parliament for its abolition. The Statute *De donis* (*k*) accordingly restrained all alienation by tenants of lands which had been granted to themselves and the heirs of their bodies; so that the lands might not fail to descend to their issue after their death, or to revert to the donors or their heirs if issue should fail. This statute was passed avowedly to restrain that right of alienation, of the prior existence of which the statute itself is the best proof. And this right, in respect of fee simple estates, was soon afterwards acknowledged and confirmed by the Statute of *Quia emptores* (*l*). But during all this period,

The Statute
De donis.

Tenants in
villanage

(*g*) Litt. ss. 78—84; Co. Litt. 59; 1 Scriv. Cop. 151, 175, 176, 264, 349; Vinogradoff, Villainage in England, 166, 172, 173, 371—378.

(*h*) The attempt here made to explain the subject is grounded on the authorities and reasoning of Mr. Serj. Scriven. (1 Scriv.

Cop. 67 *et seq.*) Mr. Watkins sets out with right principles, but seems strangely to stumble on the wrong conclusion. (1 Watk. Cop. chap. 4.)

(*i*) *Ank.* pp. 68—66, 86, 87.

(*k*) 13 Edw. I. c. 1; *ante*, p. 88.

(*l*) 18 Edw. I. c. 1.

tenants in villenage were in a very different state from the freeholders, who were the objects of the above statutes (*m*). Tenants in villenage were generally bound to labour on their lord's demesne, as the condition of remaining in the occupation of their holdings; and they were often in a state of personal bondage (*n*). Copyhold estates, however customary, were not fully recognized as rights, when the right of alienation was established in the case of freeholds (*o*). The right of an ancestor to bind his heir (*p*), with which right, as we have seen (*q*), the power to alienate freeholds commenced, never belonged to a copyholder (*r*). And, until the year 1833, copyhold lands in fee simple descended to the customary heir, quite unaffected by any bond debts of his ancestor by which the heir of his freehold estates might have been bound (*s*). It would be absurd, therefore, to suppose that the right of alienation of copyhold estates arose in connexion with the right of freeholders. The two classes were then quite distinct. The one were poor and neglected, the other powerful and consequently protected (*t*). The one were considered to hold their tenements at the will of their lords; the other maintained a right of alienation in spite of them. The one had no other security than was afforded by the force of local custom; the other could appeal to the laws of the realm.

(*m*) See *ante*, pp. 39, 40, 415—422. In the preamble of the Statute *De donis*, the tenants are spoken of as *feoffees*, and as able by deed and *feoffment* to bar their donors, showing that freeholders only were intended. And in the statute of *Quia emptores* freemen are expressly mentioned.

(*n*) See *ante*, pp. 415—422

(*o*) See *ante*, p. 417.

(*p*) *Ante*, p. 255.

(*q*) *Ante*, pp. 64—66.

(*r*) *Eyles v. Lons and Pors*, Cro. Eliz. 380.

(*s*) 4 Rep. 23 a.

(*t*) The famous provision of Magna Charta, c. 29,—“Nullus liber homo capiatur vel imprisonetur aut dissesiatur de aliquo libero tenemento suo, &c., nisi per legale iudicium parium suorum vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel iusticiam,”—whatever classes of persons it may have been subsequently construed to include—plainly points to a distinction then existing between free and not free. Why else should the word *liber* have been used at all?

Now, with regard to an estate given to a copyholder and the heirs of his body, the lords of different manors appear to have acted differently,—some of them permitting alienation on issue being born, and others forbidding it altogether. And from this difference appears to have arisen the division of manors, in regard to estates tail, into two classes, namely, those in which there is no custom to entail, and those in which such a custom exists.

As to manors where there is no custom to entail.

In manors in which there is no custom to entail, a gift of copyholds, to a man and the heirs of his body, will give him an estate analogous to the fee simple conditional which a freeholder would have acquired under such a gift before the passing of the Statute *De donis (u)*. Before he has issue, he will not be able to alien; but after issue are born to him, he may alienate at his pleasure (*x*). In this case the right of alienation appears to be of a very ancient origin, having arisen from the liberality of the lord in permitting his tenants to stand on the same footing in this respect as freeholders then stood.

Alienation was anciently allowed.

When alienation was not allowed.

But, as to those manors in which the alienation of the estate in question was not allowed, the history appears somewhat different. The estate, being inalienable, descended, of course, from father to son, according to the customary line of descent. A perpetual entail was thus set up, and a custom to entail established in the manor. But in process of time the original strictness of the lord defeated his own end. For the evils of such an entail, which had been felt as to freeholds after the passing of the Statute *De donis (y)*, became felt also as to copyholds (*z*). And, as the copyholder advanced in importance, different devices were resorted

A custom to entail was established.

(u) *Ante*, pp. 86, 87; *Doe d. Bleard v. Simpson*, 4 New Cases, 333; 3 Man. & Gran. 929.

(x) *Doe d. Spencer v. Clark*, 5

Barn. & Ald. 458.

(y) *Ante*, p. 88.

(z) 1 Scriv. Cop. 70.

to for the purpose of effecting a bar to the entail; and in different manors, different means were held sufficient for this purpose. In some, a customary recovery was suffered, in analogy to the common recovery, by which an entail of freeholds had been cut off (*a*). In others, the same effect was produced by a preconcerted forfeiture of the lands by the tenant, followed by a re-grant from the lord of an estate in fee simple. And in others, a conveyance by surrender, the ordinary means, became sufficient for the purpose; and the presumption was, that a surrender would bar the estate tail until a contrary custom was shown (*b*). Thus it happened that in all manors, in which there existed a custom to entail, a right grew up, empowering the tenant in tail, by some means or other, at once to alienate the lands. He thus ultimately became placed in a better position than the tenant to him and the heirs of his body in a manor where alienation was originally permitted. For, such a tenant can now only alienate after he has had issue. But a tenant in tail, where the custom to entail exists, need not wait for any issue, but may at once destroy the fetters by which his estate has been attempted to be bound.

The beneficial enactment before referred to (*c*), by which fines and common recoveries of freeholds were abolished, also contains provisions applicable to entails of copyholds. Instead of the cumbrous machinery of a customary recovery or of a forfeiture and re-grant, it substitutes, in every case, a simple conveyance by surrender (*d*), the ordinary means for conveying a customary estate in fee simple. When the estate tail is in remainder, the necessary consent of the protector (*e*) may be given, either by deed, to be entered on the Court rolls

(*a*) *Ante*, p. 92.

(*b*) *Gould v. White*, Kay, 688.

(*c*) Stat. 3 & 4 Will. IV. c. 74;

ante, p. 93.

(*d*) Sect. 50.

(*e*) See *ante*, p. 97.

of the manor (*f*), or by the concurrence of the protector in the surrender, in which case the memorandum or entry of the surrender must expressly state that such consent has been given (*g*).

Estate *pur
autre vie*
in copyholds.

It will be remembered that, anciently, if A., a freeholder for life, granted his land to B. simply, without mentioning his heirs, and B. died first, the first person who entered after the decease of B. might lawfully hold the lands during the residue of the life of A. (*h*). And this general occupancy was abolished by the Statute of Frauds. But copyhold lands were never subject to any such law (*i*). For the seisin or feudal possession of all such lands belongs, as we have seen (*k*), to the lord of the manor, subject to the customary rights of occupation belonging to his tenants. In the case of copyholds, therefore, the lord of the manor after the decease of B. would, until lately, have been entitled to hold the lands during the residue of A.'s life; and the Statute of Frauds had no application to such a case (*l*). But now, by the Wills Act of 1837 (*m*), the testamentary power is extended to copyhold or customary estates *pur autre vie* (*n*); and the same provision, as to the application of the estate by the executors or administrators of the grantee, as is contained with reference to freeholds (*o*), is extended also to customary and copyhold estates (*p*). The grant of an estate *pur autre vie* in copyholds may, however, be extended, by express words, to the heirs of the grantee (*q*). And in this event the heir will, in case of intestacy, be entitled to hold during

(*f*) Sect. 51.

(*g*) Sect. 52.

(*h*) *Ante*, p. 126.

(*i*) *Doe d. Foster v. Scott*, 4 B. & C. 706; 7 Dow. & Ry. 190.

(*k*) *Ante*, p. 426.

(*l*) 1 Scriv. Cop. 63, 108; 1 Watk. Cop. 302.

(*m*) Stat. 7 Will. IV. & 1 Vict. c. 26.

(*n*) Sect. 3.

(*o*) *Ante*, p. 127.

(*p*) Sect. 6.

(*q*) 1 Scriv. Cop. 64; 1 Watk. Cop. 303.

the residue of the life of the *cestui que vie*, subject to the debts of his ancestor the grantee (*r*).

Until the year 1833, copyhold lands were not liable to be taken to satisfy the tenant's debts (*s*), except in the event of his bankruptcy, to which traders only were then liable (*t*). And the Crown had no further privilege than any other creditor (*u*). But in 1833 customary-hold and copyhold estates in fee simple were made *assets* for the payment of all the debts of the deceased tenant, as well as his freeholds (*x*). Still copyholds could not be taken in execution of a judgment against the tenant until 1838; when the Act for extending creditors' remedies enabled the sheriff to deliver execution, under the writ of *elegit*, of lands of copyhold or customary tenure, as well as of freehold lands (*y*). By the same Act judgments were made a charge on the debtor's lands of copyhold or customary tenure (*z*); though not as against purchasers, unless duly registered (*a*). But purchasers of copyholds, without notice of any judgment affecting them, appear to be protected by the clause in a subsequent Act (*b*), which provides that, as to purchasers without notice, no judgment shall bind any lands otherwise than it would have bound such purchasers under the old law. And the Acts of 1860, 1864 and 1888, which further reduced the lien of judgments, and of which an account has been given in the chapter on Creditors' Rights, apply to copyholds as well as freeholds (*c*). Copyholds now vest in the Bankruptcy.

Alienation
for debt.

(*r*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 6.

(*s*) 4 Rep. 22 a; 1 Watk. Cop. 140; 1 Scriv. Cop. 60.

(*t*) *Ante*, pp. 27, n. (*f*), 254.

(*u*) Owen, 37; 7 Mod. 38, case 43; *R. v. Budd*, Parker, 192, 196; Manning's Exchequer Practice, 42, 2nd ed.

(*x*) Stat. 3 & 4 Will. IV. c. 104; *ante*, pp. 256—258. Before this

Act, copyholds were not assets even for payment of debts, in which the heir was expressly bound; 4 Rep. 22 a.

(*y*) Stat. 1 & 2 Vict. c. 110, s. 11; *ante*, pp. 244—246.

(*z*) Sect. 13.

(*a*) *Ante*, pp. 246, 247.

(*b*) Stat. 2 & 3 Vict. c. 11, s. 5; *ante*, p. 247.

(*c*) *Ante*, pp. 248—251.

Trustee for
creditors
need not be
admitted.

trustee for the creditors on the bankruptcy of the tenant (*d*). But where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar matter, the trustee is not compellable to be admitted to the property, but may deal with the same in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted or otherwise invested with the property accordingly (*e*). Estates tail and for life in copyholds are now liable to alienation for the judgment debts or on the bankruptcy of the tenant to the same extent as like estates in freeholds (*f*).

Estates tail.

Descent of an
estate in fee
simple in
copyholds.

The descent of an estate in fee simple in copyholds is governed by the custom of descent which may happen to prevail in the manor; but, subject to any such custom, the provisions contained in the Act for the amendment of the law of inheritance (*g*) apply to copyhold as well as freehold hereditaments, whatever be the customary course of their descent (*h*). As, in the case of freeholds, the lands of a person dying intestate descend at once to his heir (*i*), so the heir of a copyholder becomes, immediately on the decease of his ancestor, tenant of the lands, and may exercise any act of ownership before the ceremony of his admittance has taken place (*k*). But as between himself and the lord, he is not completely a tenant till he has been admitted.

(*d*) Stat. 46 & 47 Vict. c. 52, ss. 20, 168.

(*e*) Stat. 46 & 47 Vict. c. 52, s. 50, sub-s. 4. The former enactments relating to this subject were stats. 12 & 18 Vict. c. 106, s. 209; 24 & 25 Vict. c. 124, s. 114; and 32 & 33 Vict. c. 71, s. 22.

(*f*) *Ante*, pp. 262—264.

(*g*) Stat. 3 & 4 Will. IV. c. 106.

(*h*) See *Re Smart*, 18 Ch. D. 165.

(*i*) *Ante*, p. 81.

(*k*) 1 Scriv. Cop. 357; *Right d. Taylor v. Banks*, 3 Bar. & Ad. 664; *King v. Turner*, 1 My. & K. 456; *Doe d. Parry v. Wilson*, 5 Ad. & Ell. 321.

The tenure of an estate in fee simple in copyholds *Tenure*. involves, like the tenure of freeholds, an oath of fealty *Fealty*. from the tenant (*l*), together with suit to the customary *Suit of Court*. Court of the manor. Escheat to the lord on failure of *Escheat*. heirs is also an incident of copyhold tenure. And before the abolition of forfeiture for treason and felony (*m*) the lord of a copyholder had the advantage over the lord of a freeholder in this respect, that, whilst freehold lands in fee simple were forfeited to the Crown by the treason of the tenant, the copyholds of a traitor escheated to the lord of the manor of which they were held (*n*). Rents (*o*) also of small amount are not un- *Rent*. frequent incidents of the tenure of copyhold estates. And reliefs (*p*) may, by special custom, be payable by *Relief*. the heir (*q*). The other incidents of copyhold tenure depend on the customs of each particular manor; for this tenure, as we have seen (*r*), escaped the destruction in which the tenure of all freehold lands (except free and common socage, and frankalmoign) were involved by the Act of 12 Car. II. c. 24. When a copyholder in fee aliens his land to another in tail or for life, the latter does not hold of him, as he would in the case of freeholds (*s*), but of the lord (*t*).

A curious incident to be met with in the tenure of some copyhold estates is the right of the lord, on the death of a tenant, to seize the tenant's best beast, or other chattel, under the name of a heriot (*u*). Heriots *Heriots*. were English institutions before the Norman Conquest. The heriot, properly so called, was a tribute of war-

(*l*) 2 Scriv. Cop. 732; Vinogradoff, Villainage, 164.

(*m*) See *ante*, p. 52.

(*n*) *Lord Cornwallis's case*, 2 Vent. 88; 1 Watk. Cop. 340; 1 Scriv. Cop. 552.

(*o*) *Ante*, p. 52. Rent incident to copyhold tenure may be redeemed under stat. 44 & 45 Vict. c. 41, s. 45; see Williams's Con-

veyancing Statutes, 217, 218.

(*p*) *Ante*, pp. 45, 48, 52; Vinogradoff, Villainage in England, 162.

(*q*) 1 Scriv. Cop. 436.

(*r*) *Ante*, p. 51.

(*s*) *Ante*, pp. 103, 107.

(*t*) Litt. s. 74; *ante*, p. 423.

(*u*) 1 Scriv. Cop. 437 *et seq.*, 3rd ed.

horses, weapons and armour, varying in quantity according to the degree, which became due to the king on the death of an eorl or a thegn (*x*). Its origin is traced to the horse and arms with which the German *princeps* supplied each of his *comites*, and which reverted to him on the death of the *comes* (*y*). When the law of feudal tenure by military service had grown up in England after the Norman Conquest, these heriots were generally superseded by reliefs (*z*), and so became obsolete. The heriots, which are now connected with copyhold tenure, have a different origin. Before the Norman Conquest, it appears to have been the custom in many places that the freeholder of land, who took a man to work on his demesne as his tenant in villenage, should furnish him with oxen, a cow, sheep and implements of husbandry, as his farming outfit. These remained the property of the freeholder, and reverted to him on the tenant's death (*a*); but were usually transferred to the new tenant along with the holding. As time went on, it became an established custom that the tenant's heir should succeed to his deceased ancestor's holding, and that the landlord should not take into his own hands all the deceased tenant's cattle and stock, but should only take the best beast or some other chattel. The chattel, which the lord was accustomed to take for himself on the death of his tenant in villenage, seems to have acquired the name of heriot, by analogy to the heriot properly so called (*b*). And to the taking of this so called *heriot*, the lord's right in

(*x*) Kemble, Saxons in England, Vol. I. p. 173; Vol. II. p. 98; 1 Stubbs, Const. Hist. 200, note, 2nd ed. See Stubbs, Select Charters, 74, 91.

(*y*) Tacitus, Germania, c. 14; see Maine, Early Law and Custom, pp. 346—348; 1 Stubbs, Const. Hist. 24, 2nd ed.

(*z*) 1 Stubbs, Const. Hist. § 96, p. 261, 2nd ed.; Freeman, Nor-

man Conquest, Vol. V. pp. 379, 387.

(*a*) See *Rectitudines Singularum Personarum*, Ancient Laws and Institutes of England, 186; Seebohm, English Village Community, 182, 188, see also p. 61.

(*b*) Kemble, Saxons in England, Vol. I. p. 178; Vol. II. p. 98; Vinogradoff, Villainage in England, 159—162.

the tenant's chattels was at last restricted (c). In this way the heriot became an incident of tenure in villenage, and it remained an incident of copyhold tenure (d). The right of the lord is now confined to such a chattel as the custom of the manor, grown into a law, will enable him to take (e). The kind of chattel which may be taken for a heriot varies in different manors. And in some cases the heriot consists merely of a money payment.

All kinds of estates in copyholds, as well as in free-Joint tenancy
holds, may be held in joint tenancy or in common : and in common.
an illustration of the unity of a joint tenancy occurs in the fact, that the admission, on the court rolls of a manor, of one joint tenant, is the admission of all his companions ; and on the decease of any of them the survivors or survivor, as they take no new estate, require no new admittance (f). The jurisdiction of the Court of Chancery in enforcing partitions between joint tenants and tenants in common did not formerly extend to copyhold lands (g). But by the Copyhold Act of

(c) See Laws of Cnut, c. 71; Stubbs, Select Charters, p. 74, 2nd ed.; Glanville, lib. 7, c. v.; Bracton, fo. 60, 86 a; Britton, lib. 3, c. v, § 5, fo. 178; Fleta, lib. 2, c. lvii.

(d) Sometimes a heriot is due on the death of a freeholding tenant of a manor, either as rent service, or by virtue of an immemorial custom. * Heriot service is when a heriot has been reserved as an incident of the tenure of an estate in fee simple granted in free tenure before stat. 18 Edw. I. c. 1. Such a reservation would seem to point to the grant of an estate of freehold upon the enfranchisement of a holding in villenage. When a heriot is due from a freeholder by custom (called † heriot custom), the fact also seems to

point to a heriot, yielded by a former tenant in villenage, which has remained the lord's customary due after the enfranchisement of the holding. See *ante*, pp. 42, 48, 417, and note (c); 1 Scriv. Cop. 437 *et seq.*, 3rd ed.; Williams on Seisin, App. A. By the custom of the manor of South Tawton, otherwise Itton, in the county of Devon, heriots are * Heriot still due from the freeholders service. of the manor; *Damerell v. Protheros*, 10 Q. B. 20; and in Sussex and some parts of Surrey heriots from freeholders are not unfrequent. See *Lord Zouch v. Dalbiac*, L. R., 10 Ex. 172.

(e) 2 Watk. Cop. 129.

(f) 1 Watk. Cop. 272, 277.

(g) *Jope v. Morehead*, 6 Beav. † Heriot custom. 218.

1841 (*h*) this jurisdiction was extended to the partition of copyholds as well as freeholds.

Act for commutation of certain manorial rights.

The rights of lords of manors to fines and heriots, rents, reliefs and customary services, together with the lord's interests in the timber growing on copyhold lands, have been found productive of considerable inconvenience to copyhold tenants, without any sufficient corresponding advantage to the lords. An Act of Parliament (*i*) was accordingly passed in the year 1841, by which the commutation of these rights and interests, together with the lord's rights in mines and minerals, if expressly agreed on, has been greatly facilitated. The machinery of the Act is, in many respects, similar to that by which the commutation of tithes was effected. The rights and interests of the lord are changed, by the commutation, into a rent charge varying or not, as may be agreed on, with the price of corn, together with a small fixed fine on death or alienation, in no case exceeding the sum of five shillings (*k*). By the same Act facilities were also afforded for the *enfranchisement* of copyhold lands, or the conveyance of the freehold of such lands from the lord to the tenant, whereby the copyhold tenure, with all its incidents, is for ever destroyed (*l*). The principal object of these enactments was to provide for the case of the lands being in settlement, or vested in parties not otherwise capable of at once entering into a complete arrangement; but no provision was made for compulsory enfranchisement. Subsequently, however, Acts were passed to make the enfranchisement of copyholds compulsory at the instance

Enfranchisement.

The Copyhold Acts, 1852, 1858, and 1887.

(*h*) Stat. 4 & 5 Vict. c. 85, s. 85. See also stat. 18 & 19 Vict. c. 60, s. 30.

(*i*) Stat. 4 & 5 Vict. c. 85, amended by 6 & 7 Vict. c. 28; 7 & 8 Vict. c. 55; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94; 31 &

32 Vict. c. 89; 50 & 51 Vict. c. 78; 52 & 53 Vict. c. 30.

(*k*) Stats. 4 & 5 Vict. c. 35, s. 14; 15 & 16 Vict. c. 51, s. 41.

(*l*) Stats. 4 & 5 Vict. c. 35, ss. 56 *et seq.*; 6 & 7 Vict. c. 28; 7 & 8 Vict. c. 55, ss. 4, 5.

either of the tenant or of the lord (*m*). If the enfranchisement be made at the instance of the tenant, the compensation is to be a gross sum of money to be paid before completion of the enfranchisement; and where the enfranchisement is effected at the instance of the lord, the compensation, unless the parties otherwise agree, or the tenant elect to pay a gross sum before completion, is to be an annual rent-charge issuing out of the enfranchised lands, but redeemable by the tenant thereof for the time being (*n*). Provision is also made for charging the enfranchised lands with the cost of enfranchisement (*o*). Enfranchisements under these Acts are irrespective of the validity of the lord's title (*p*). They are now effected by an award of enfranchisement, confirmed by the Board of Agriculture (*q*). But the curtesy, dower or freebench of persons married before the enfranchisement shall have been completed, is expressly saved (*r*): and all the commonable rights of the tenant continue attached to his lands, notwithstanding the same shall have become freehold (*s*). And no enfranchisement under these Acts is to affect the estate or rights of any lord or tenant in any mines or minerals within or under the lands enfranchised or any other lands, unless with the express consent in writing of such lord or tenant (*t*). On any enfranchisement after the passing of the Copyhold Act, 1887, the lord of the manor shall continue to be entitled in case of escheat for want of heirs to the same right and interest in the land as he would have had if it had not been en-

Compulsory
enfranchise-
ment.

Saving of
curtesy,
dower and
freebench,

and of com-
monable
rights.

Mines and
minerals.

Escheat.

(*m*) Stat. 15 & 16 Vict. c. 51, amended by 21 & 22 Vict. c. 94, and 50 & 51 Vict. c. 73.

(*n*) Stat. 50 & 51 Vict. c. 73, ss. 3, 9—20, replacing 15 & 16 Vict. c. 51, s. 7; see 21 & 22 Vict. c. 94, s. 12.

(*o*) Stats. 15 & 16 Vict. c. 51, s. 32; 21 & 22 Vict. c. 94, ss. 21 *et seq.*; 50 & 51 Vict. c. 73, s. 23.

(*p*) *Kerr v. Pauson*, 25 Beav.

394.

(*q*) Stats. 21 & 22 Vict. c. 94, s. 10; 52 & 53 Vict. c. 30, s. 2.

(*r*) Stats. 4 & 5 Vict. c. 35, s. 79; 15 & 16 Vict. c. 51, s. 34.

(*s*) Stats. 4 & 5 Vict. c. 35, s. 81; 15 & 16 Vict. c. 51, s. 45.

(*t*) Stat. 15 & 16 Vict. c. 51, s. 43. See also stat. 21 & 22 Vict. c. 94, s. 14.

franchised; and in making valuations for compensation, the value of escheats shall not be taken into consideration (u). The same Act also provides for the extinguishment, at the instance of either lord or tenant, of any heriot, quit-rent or other manorial incident, to which any land of (whatever tenure) is liable (x). The enfranchisement of copyholds may be also made, irrespectively of the Copyhold Acts (y), where all parties are *sui juris* and agree thereto, by a simple conveyance of the fee simple from the lord to his tenant (z). And under the Settled Land Act, 1882 (a), the tenant for life of a manor may sell and convey the freehold and inheritance of any copyhold or customary land, parcel of the manor, either with or without the mines and minerals thereunder, so as to effect an enfranchisement.

Heriots, &c.

Enfranchisement by agreement.

By tenant for life.

(u) Stat. 50 & 51 Vict. c. 73, ss. 4, 5; passed 16th Sept., 1887.

(x) Stat. 50 & 51 Vict. c. 73, s. 7, replacing 21 & 22 Vict. c. 94, s. 7, and 15 & 16 Vict. c. 51, s. 27.

(y) Stat. 15 & 16 Vict. c. 51, s. 55.

(z) 1 Wath. Cop. 362; 1 Scriv. Cop. 653. Deeds of enfranchise-

ment of copyholds in Middlesex or Yorkshire must be duly registered; *R. v. Registrar of Deeds for Middlesex*, 21 Q. B. D. 555; *ante*, pp. 196-198.

(a) Stat. 45 & 46 Vict. c. 38, ss. 8, 20; see Williams's Conveyancing Statutes, 295, 296, 331.

CHAPTER II.

OF THE ALIENATION OF COPYHOLDS.

THE mode in which the alienation of copyholds is at present effected, so far at least as relates to transactions *inter vivos*, still retains much of the simplicity, as well as the inconvenience, of the original method in which the alienation of these lands was first allowed to take place. The copyholder surrenders the lands into the hands of his lord, who thereupon admits the alienee. For the purpose of effecting these admissions, and of informing the lord of the different events happening within his manor, as well as for settling disputes, it was formerly necessary that his customary Court, to which all the copyholders were suitors, should from time to time be held. The copyholders present at this Court were called the *homage*; a word equally used to denote the body of freeholders present at a Court Baron (a). In order to form a Court, it was formerly necessary that two copyholders at least should be present (b). But, in modern times, the holding of Courts having degenerated into little more than an inconvenient formality, it has been provided by the Copyhold Act of 1841, that Customary Courts may be holden without the presence of any copyholder; but no proclamation made at any such Courts is to affect the title or interest of any person not present, unless notice thereof shall be duly served on him within one month (c): and it is also provided,

Customary Court.

Homage.

Courts may now be holden without the presence of any copyholder.

(a) *Ante*, pp. 419, 421; 1 Scriv. Cop. 7.

(b) 1 Scriv. Cop. 289.

(c) Stat. 4 & 5 Vict. c. 35, s. 86.

Court rolls.
Steward.

that where, by the custom of any manor, the lord is authorized, with the consent of the homage, to grant any common or waste lands of the manor, the Court must be duly summoned and holden as before the Act (*d*). No Court can lawfully be held out of the manor; but by immemorial custom, Courts for several manors may be held together within one of them (*e*). In order that the transactions at the Customary Court may be preserved, a book is provided, in which a correct account of all the proceedings is entered by a person duly authorized. This book, or a series of them, forms the court rolls of the manor. The person who makes the entries is the steward; and the court rolls are kept by him, but subject to the right of the tenants to inspect them (*f*). This officer also usually presides at the Court of the manor.

Grants.

Before advertng to alienation by surrender and admittance, it will be proper to mention, that, whenever any lands, which have been demisable time out of mind by copy of court roll, fall into the hands of the lord, he is at liberty to grant them to be held by copy at his will, according to the custom of the manor, under the usual services (*g*). These grants may be made by the lord for the time being, whatever be the extent of his interest (*h*), so only that it be lawful: for instance, by a tenant for a term of life or years. But if the lord instead of granting the lands by copy, should once make any conveyance of them at the common law, though it were only a lease for years, his power to grant by copy would for ever be destroyed (*i*). The steward, or his deputy, if duly authorized so to do, may also make grants, as well as the lord, whose

(*d*) Stat. 4 & 5 Vict. c. 35, Cop. 111.
s. 91.
(*e*) 1 Scriv. Cop. 6.
(*f*) Ibid. 587, 588.
(*g*) 1 Watk. Cop. 23; 1 Scriv. stat. 50 & 51 Vict. c. 78, s. 6.
(*h*) *Doe d. Rayer v. Strickland*,
2 Q. B. 792.
(*i*) 1 Watk. Cop. 37. See too

servant he is (*j*). It was formerly doubtful whether the steward or his deputy could make grants of copyholds when out of the manor (*k*). But by the Copyhold Act of 1841 (*l*), it is provided that the lord of any manor, or the steward, or deputy steward, may grant at any time, and at any place, either within or out of the manor, any lands parcel of the manor, to be held by copy of court roll, or according to the custom of the manor, which such lord shall for the time being be authorized and empowered to grant out to be held as aforesaid; so that such lands be granted for such estate, and to such person only, as the lord, steward, or deputy shall be authorized or empowered to grant the same.

Grants may now be made out of the manor.

When a copyholder is desirous of disposing of his lands, the usual method of alienation is by surrender of the lands into the hands of the lord (usually through the medium of his steward), to the use of the alienee and his heirs, or for any other customary estate which it may be wished to bestow. This surrender generally takes place by the symbolical delivery of a rod, by the tenant to the steward. It may be made either in or out of Court. If made in Court, it is of course entered on the court rolls, together with the other proceedings; and a copy of so much of the roll as relates to such surrender is made by the steward, signed by him, and stamped like a purchase deed; it is then given to the purchaser as a muniment of his title (*m*). If the surrender should be made out of Court, a memorandum of the transaction, signed by the parties and the steward is made, in writing, and duly stamped as before (*n*).

Alienation by surrender.

In Court.

Out of Court.

(*j*) 1 Watk. Cop. 29.

(*k*) Ibid. 30.

(*l*) Stat. 4 & 5 Vict. c. 35, s. 87.

(*m*) A form of such a copy of court roll will be found in Appendix (G).

(*n*) By the Stamp Act, 1891,

the stamp duty on a memorandum of a surrender if made out of Court, or on the copy of court roll, if made in Court, is the same as on the sale or mortgage of a freehold estate; but if not made on a sale or mortgage, the duty is 0s. Stat. 54 & 55 Vict. c. 39,

Presentment, In order to give effect to a surrender made out of Court, it was formerly necessary that due mention, or *presentment*, of the transaction, should be made by the suitors or homage assembled at the next, or, by special custom, at some other subsequent Court (*o*). And in this manner an entry of the surrender appeared on the court rolls, the steward entering the presentment as part of the business of the Court. But by the Copyhold Act of 1841, it is provided that surrenders, copies of which may be delivered to the lord, his steward, or deputy steward, shall be forthwith entered on the court rolls; which entry is to be deemed to be an entry made in pursuance of a presentment by the homage (*p*). So that in this case, the ceremony of presentment is now dispensed with. When the surrender has been made, the surrenderor still continues tenant to the lord, until the admittance of the surrenderee. The surrenderee acquires by the surrender merely an inchoate right, to be perfected by admittance (*q*). This right was formerly inalienable at law, even by will, until rendered devisable by the Wills Act, 1837 (*r*); but, like a possibility in the case of freeholds, it may always be released, by deed, to the tenant of the lands (*s*).

now unnecessary.

Nature of surrenderee's right until admittance.

Surrender to the use of a wife. A surrender of copyholds might always be made by a man to the use of his wife, for such a surrender is not a direct conveyance, but operates only through the instrumentality of the lord (*t*). And a valid surrender might at any time be made of the lands of a married woman,

Surrender of lands of the wife.

1st schedule, tit. Copyhold and Customary Estates, replacing stat. 38 & 34 Vict. c. 97, to the same effect.

(*o*) 1 Watk. Cop. 79; 1 Scriv. Cop. 277.

(*p*) Stat. 4 & 5 Vict. c. 85, s. 89.

(*q*) *Doe* d. *Tofield* v. *Tofield*, 11 East, 246; *Rez* v. *Dams* *Jane*

St. John Mildmay, 5 B. & Ad. 254; *Doe* d. *Winder* v. *Lawes*, 7 Ad. & E. 195.

(*r*) 7 Will. IV. & 1 Vict. c. 26, s. 3.

(*s*) *Kite and Quainton's case*, 4 Rep. 25 a; Co. Litt. 60 a.

(*t*) Co. Cop. s. 85; *Trusts*, p. 79.

by her husband and herself; she being on such surrender separately examined, as to her free consent, by the steward or his deputy (*u*). By the Vendor and Purchaser Act, 1874 (*x*), where any copyhold hereditament shall be vested in a married woman, as a bare trustee (*z*), Married woman bare trustee. she may surrender the same as if she were a feme sole. And under the Married Women's Property Act, 1882 (*a*), Copyholds, which are wife's separate property. a married woman may dispose of copyholds, which belong to her as her separate property by virtue of that Act, in the same manner as if she were a feme sole.

When the surrender has been made, the surrenderee Admittance. has, at any time, a right to procure *admittance* to the lands surrendered to his use; and, on such admittance, he becomes at once tenant to the lord, and is bound to pay him the customary fine. This admittance is usually taken immediately (*b*); but, if obtained at any future time, it will relate back to the surrender; so that, if the surrenderor should, subsequently to the surrender, have surrendered to any other person, the admittance of the former surrenderee, even though it should be subsequent to the admittance of the latter, will completely displace his estate (*c*). Formerly a steward was unable to admit tenants out of a manor (*d*); but, by the Copyhold Act of 1841, the lord, his steward, or deputy, may admit at any time, and at any place, either within or out of the manor, and without holding a Court; and the admission is rendered valid without any presentment of the surrender, in pursuance of which admission may have been granted (*e*). Admittance may now be had out of the manor.

(*u*) 1 Watk. Cop. 63.

(*x*) Stat. 37 & 38 Vict. c. 78, s. 6.

(*z*) See *ante*, p. 294, n. (*r*).

(*a*) Stat. 45 & 46 Vict. c. 75, ss. 1 (sub-s. 1), 2, 5; see *ante*, pp. 291–294.

(*b*) See Appendix (G).

W.R.P.

(*c*) 1 Watk. Cop. 103.

(*d*) *Doe* d. *Leach* v. *Whittaker*, 5 B. & Ad. 409, 435; *Doe* d. *Gutteridge* v. *Sowerby*, 7 C. B., N. S. 589.

(*e*) Stat. 4 & 5 Vict. c. 85 ss. 88, 90.

Alienation by
will.

The alienation of copyholds by will was formerly effected in a similar manner to alienation *inter vivos*. It was necessary that the tenant who wished to devise his estate should first make a surrender of it to the use of his will. His will then formed part of the surrender, and no particular form of execution or attestation was necessary. The devisee, on the decease of his testator, was, until admittance, in the same position as a surrenderee (*f*). By a statute of Geo. III. (*g*), a devise of copyholds, without any surrender to the use of the will, was rendered as valid as if a surrender had been made (*h*). The Wills Act of 1837 requires that wills of copyhold lands shall be executed and attested in the same manner as wills of freeholds (*i*). But a surrender to the use of the will is still unnecessary; and a surrenderee, or devisee, who has not been admitted, is now empowered to devise his interest (*j*). Formerly, the devisee under a will was accustomed, at the next Customary Court held after the decease of his testator, to bring the will into Court; and a presentment was then made of the decease of the testator, and of so much of his will as related to the devise. After this presentment the devisee was admitted, according to the tenor of the will. But under the Copyhold Act of 1841, the mere delivery to the lord, or his steward, or deputy steward, of a copy of the will, is sufficient to authorize its entry on the court rolls, without the necessity of any presentment; and the lord, or his steward, or deputy steward, may admit the devisee at once, without holding any Court for the purpose (*k*).

Presentment
of will,

now unneces-
sary.

(*f*) *Wainwright v. Elwell*, 1 Mad. 627; *Phillips v. Phillips*, 1 My. & K. 649, 664.

(*g*) 55 Geo. III. c. 192, 12th July, 1815.

(*h*) *Doe d. Nethercote v. Bartle*, 5 B. & Ald. 492.

(*i*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 2, 3, 4, 5, 9; see *ante*, p. 222; *Garland v. Mead*, L. R., 6 Q. B. 441.

(*j*) Sect. 3.

(*k*) Stat. 4 & 5 Vict. c. 85, ss. 88, 89, 90.

Sometimes, on the decease of a tenant, no person comes in to be admitted as his heir or devisee. In this case the lord, after making due proclamation at three consecutive Courts of the manor for any person having right to the premises to claim the same and be admitted thereto, is entitled to seize the lands into his own hands *quousque*, as it is called, that is, *until* some person claims admittance (l); and by the special custom of some manors, he is entitled to seize the lands absolutely. But as this right of the lord might be very prejudicial to infants, married women, and lunatics entitled to admittance to any copyhold lands, in consequence of their inability to appear, special provision has been made by Act of Parliament for the vicarious admission of such persons, securing to the lord his proper fine, and prohibiting any absolute forfeiture of the lands for the neglect or refusal of any infant, married woman or lunatic so found by inquisition to come in and be admitted, or to pay the fine imposed on admittance (m).

If no person claim admittance, the lord may seize *quousque*.

Provision in favour of infants, married women, lunatics.

Although mention has been made of surrenders to the use of the surrenderee, it must not, therefore, be supposed that the Statute of Uses (n) has any application to copyhold lands. This statute relates exclusively to freeholds. The seisin or feudal possession of all copyhold land ever remains, as we have seen (o), vested in the lord of the manor. Notwithstanding that custom has given to the copyholder the enjoyment of the lands, they still remain, in contemplation of law, the lord's freehold. The copyholder cannot, therefore, simply by means of a surrender to his use from a former copyholder, be deemed, in the words of the Statute of Uses, in lawful seisin for such estate

Statute of Uses does not apply to copyholds.

(l) 1 Watk. Cop. 284; 1 Scriv. Cop. 855; *Doe d. Bover v. Trusman*, 1 Barn. & Adol. 736.

(m) Stats. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 8-9; 58 Vict. c. 5, ss. 116, 125, 128. See *Doe d. Twining v. Muscott*, 12 M.

& W. 832, 842; *Dimes v. Grand Junction Canal Company*, 9 Q. B. 469, 510.

(n) Stat. 27 Hen. VIII. c. 10; *ante*, p. 164.

(o) *Ante*, p. 426.

as he has in the use; for the estate of the surrenderor is customary only, and the estate of the surrenderee cannot, consequently, be greater. Custom, however, has now rendered the title of the copyholder quite independent of that of his lord. When a surrender of copyholds is made into the hands of the lord *to the use* of any person, the lord is now merely an instrument for carrying the intended alienation into effect; and the title of the lord, so that he be lord *de facto*, is quite immaterial to the validity either of the surrender or of the subsequent admittance of the surrenderee (*p*). But if a surrender should be made for one person to the use of another *upon trust* for a third, the High Court of Justice would exercise the same jurisdiction over the surrenderee, in compelling him to perform the trust, as it would in the case of freeholds vested in a trustee. And when copyhold lands form the subject of settlement, the usual plan is to surrender them to the use of trustees, as joint tenants of a customary estate in fee simple, upon such trusts as will effect, in equity, the settlement intended. The trustees thus become the legal copyhold tenants of the lord, and account for the rents and profits to the persons beneficially entitled. The equitable estates which are thus created are of a similar nature to the equitable estates in freeholds, of which we have already spoken (*q*); and a trust for the separate use of a married woman might be created as well out of copyhold as out of freehold lands (*r*). An equitable estate tail in copyholds may be barred by deed, in the same manner in every respect as if the lands had been of freehold tenure (*s*). But the deed, instead of being inrolled in the Court of Chancery or the Supreme Court (*t*), must be entered on the court rolls of the manor (*u*). And if there be a protector, and he consent to the disposition by a distinct

Trusts.

Settlements.

Separate use.

Equitable estate tail may be barred by deed.

(*p*) 1 Watk. Cop. 74.

(*q*) *Ante*, p. 169 *et seq.*

(*r*) See *ante*, pp. 287—290.

(*s*) See *ante*, pp. 93, 176.

(*t*) Stat. 3 & 4 Will. IV. c. 74, s. 54. See *ante*, p. 93.

(*u*) Sect. 53. It has been decided, contrary to the prevalent

deed, such deed must be executed by him either on, or any time before, the day on which the deed barring the entail is executed; and the deed of consent must also be entered on the court rolls (*x*). Upon the death of a sole trustee of copyholds, being the tenant on the court rolls, his estate, if of inheritance, does not devolve upon his personal representatives, according to the law now governing the devolution of a similar interest in freeholds, but will pass to his heir or devisee (*y*).

As the owner of an equitable estate has, from the nature of his estate, no legal rights to the lands, he is not himself a copyholder. He is not a tenant to the lord: this position is filled by his trustee. The trustee, therefore, is admitted and may surrender; but the cestui que trust cannot adopt these means of disposing of his equitable interest (*z*). To this general rule, however, there have been admitted, for convenience sake, two exceptions. The first is that of a tenant in tail whose estate is merely equitable: by the Act for the abolition of fines and recoveries (*a*), the tenant of a merely equitable estate tail is empowered to bar the entail, either by deed in the manner above described, or by surrender in the same manner as if his estate were legal (*b*). The second exception relates to married women, it being provided by the same Act (*c*) that whenever a husband and wife shall surrender any copyhold lands in which she alone, or she and her husband in her right, may

Equitable estate cannot be surrendered.

Exceptions.

Tenant of equitable estate tail may bar entail by surrender.

Husband and wife may surrender wife's equitable estate.

impression, that the entry must be made within six calendar months. *Honeywood v. Forster*, M. R., 9 W. R. 855; 80 Beav. 1; *Gibbons v. Snape*, 32 Beav. 130; *Green v. Paterson*, 32 Ch. D. 95. (*x*) Stat. 3 & 4 Will. IV. c. 74, s. 53. (*y*) Stat. 50 & 51 Vict. c. 73, s. 46, repealing 44 & 45 Vict. c. 41, s. 30, as to copyholds; see *ante*, p. 179; *Re Mills' Trust*,

37 Ch. D. 312, 40 Ch. D. 14.

(*z*) 1 Scriv. Cop. 262. No fine can be exacted by the lord in respect of any devolution of the equitable estate; *Hall v. Bromley*, 35 Ch. D. 642.

(*a*) Stat. 3 & 4 Will. IV. c. 74, s. 50.

(*b*) See *ante*, p. 435.

(*c*) Stat. 3 & 4 Will. IV. c. 74, s. 90.

have any equitable estate or interest, the wife shall be separately examined in the same manner as she would have been, had her estate or interest been at law instead of in equity merely (*d*); and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders previously made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are thereby declared to be good and valid. But these methods of conveyance, though tolerated by the law, are not in accordance with principle; for an equitable estate is, strictly speaking, an estate in the contemplation of equity only, and has no existence anywhere else. As, therefore, an equitable estate tail in copyholds may properly be barred by a deed entered on the court rolls of the manor, so an equitable estate or interest in copyholds belonging to a married woman was more properly conveyed by a deed, executed with her husband's concurrence, and *acknowledged* by her in the same manner as if the lands were freehold (*e*). And the Act for the abolition of fines and recoveries, by which this mode of conveyance is authorized, does not require that such a deed should be entered on the court rolls. If a married woman's equitable estate in copyholds belong to her for her separate use, or as her separate property under the Married Women's Property Act, 1882, she may dispose thereof in the same manner as if she were a feme sole (*f*).

Remainders.

Copyhold estates admit of remainders analogous to those which may be created in estates of freehold (*g*). And when a surrender or devise is made to the use of any person for life, with remainders over, the admission

(*d*) See *ante*, p. 448.

(*e*) Stat. 3 & 4 Will. IV. c. 74, s. 77. See *ante*, p. 284.

(*f*) See *ante*, pp. 287-294.

(*g*) See *ante*, pp. 312, 324.

of the tenant for life is the admission of all persons having estates in remainder, unless there be in the manor a special custom to the contrary (*h*). A vested estate in remainder is capable of alienation by the usual mode of surrender and admittance. Contingent remainders of copyholds have always had this advantage, that they have never been liable to destruction by the sudden determination of the particular estate on which they depend. The freehold, vested in the lord, is said to be the means of preserving such remainders until the time when the particular estate would regularly have expired (*i*). In this respect they resemble contingent remainders of equitable or trust estates of freeholds, as to which we have seen that the legal seisin, vested in the trustees, preserves the remainders from destruction (*k*). But if the contingent remainder be not ready to come into possession the moment the particular estate would naturally and regularly have expired, such contingent remainder will fail altogether (*l*): unless it should have been created after the Act of 1877 amending the law as to contingent remainders (*m*), and would have been valid, if created as an executory limitation; in which case it will be preserved by the Act, which extends to hereditaments of any tenure. In other respects the creation of contingent remainders of legal and equitable estates in copyholds appears to be governed by the same rules as are applicable to similar interests in freeholds (*n*).

Executory devises of copyholds, similar in all respects

Executory
devises.

(*h*) 1 Watk. Cop. 276; *Doe* d. *Winder* v. *Lawes*, 7 Ad. & E. 195; *Smith* v. *Glasscock*, 4 C. B., N. S. 357; *Handfield* v. *Randfield*, 1 Drew & S. 310. See, however, as to the reversioner, *Reg.* v. *Lady of the Manor of Dallingham*, 8 Ad. & E. 858.

(*i*) *Fearne*, Cont. Rem. 319;

1 Watk. Cop. 196; 1 Scriv. Cop. 477; *Pickersgill* v. *Grey*, 80 Beav. 352.

(*k*) *Ante*, p. 344.

(*l*) *Gilb. Ten.* 266; *Fearne*, Cont. Rem. 320.

(*m*) Stat. 40 & 41 Vict. c. 38; see *ante*, pp. 383, 378.

(*n*) *Ante*, pp. 378—383.

to executory devises of freeholds, have long been permitted (o). And directions to executors to sell the copyhold lands of their testator (which directions, we have seen (p), give rise to executory interests) are still in common use; for, when such a direction is given, the executors, taking only a power and no estate, have no occasion to be admitted; and if they can sell before the lord has had time to hold his three Customary Courts for making proclamation in order to seize the land *quousque* (q), the purchaser from them will alone require admittance by virtue of his executory estate which arose on the sale. By this means the expense of only one admittance is incurred; whereas, had the lands been devised to the executors in trust to sell, they must first have been admitted under the will, and then have surrendered to the purchaser, who again must have been admitted under their surrender. And in a case, where a testator devised copyholds to such uses as his trustees should appoint, and subject thereto to the use of his trustees, their heirs and assigns for ever, with a direction that they should sell his copyholds, it was decided that the trustees could make a good title without being admitted, even although the lord had in the meantime seized the land *quousque* for want of a tenant (r). But it has been decided that the lord of a manor is not bound to accept a surrender of copyholds *inter vivos*, to such uses as the surrenderee shall appoint, and, in default of appointment, to the use of the surrenderee, his heirs and assigns (s). This decision is in accordance with the old rule, which construed surrenders of copyholds in the same manner as a conveyance of

Lord not bound to accept a surrender *inter vivos* to shifting uses.

(o) 1 Watk. Cop. 210.

(p) *Ante*, p. 867. The stat. 21 Hen. VIII. c. 4 applies to copyholds; *Peppercorn v. Wayman*, 5 De Gex & S. 230; *ante*, p. 868.

(q) See *ante*, p. 451.

(r) *Glass v. Richardson*, 9 Hare, 698; 2 De Gex, M. & G. 658;

and see *The Queen v. Corbett*, 1 E. & B. 886; *The Queen v. Wilson*, 8 B. & S. 201.

(s) *Flack v. The Master, Fellows and Scholars of Downing College*, C. P., 17 Jur. 697; 13 C. B. 945.

freeholds *inter vivos* at common law (*t*). If, however, the lord should accept such a surrender, he will be bound by it, and must admit the appointee under the power of appointment, in case such power should be exercised (*u*).

With regard to the interest possessed by husband and wife in each other's copyhold lands, the husband was entitled to the whole income of his wife's land during her coverture, unless the land were settled on trust for her separate use (*x*). But the Married Women's Property Act, 1870 (*y*), provided that when any copyhold or customary property should descend upon any woman married after the passing of that Act, as heiress or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use. And under the Married Women's Property Act, 1882, a married woman is entitled to have and to hold any copyhold land, which belongs to her as her separate property under that Act, and the rents and profits thereof, in the same manner as if she were a feme sole (*z*). A special custom appears to be necessary to entitle a husband to be tenant by curtesy of his wife's copyholds (*a*). A special custom also is required to entitle the wife to any interest in the lands of her husband after his decease. Where such custom exists, the wife's interest is termed her *freebench*; and it generally consists of a life interest in one divided third part of the lands, or sometimes of a life interest in the en-

Husband and wife.

Married Women's Property Act, 1870.

Wife's separate property.

Curtsey.

Freebench.

(*t*) 1 Watk. Cop. 106, 110; 1 Serv. Cop. 178.

(*u*) *The King v. The Lord of the Manor of Oundle*, 1 Ad. & E. 288; *Boddington v. Abernathy*, 5 B. & C. 776; 9 Dow. & Ry. 626; 1 Serv. Cop. 226, 229; *Eddleston v. Collins*, 8 De Gex, M. & G. 1.

(*x*) 1 Watk. Cop. 273, 335, 4th ed. See *ante*, pp. 281, 287.

(*y*) Stat. 33 & 34 Vict. c. 93, s. 8; passed 9th Aug. 1870. See *ante*, p. 290 and n. (*o*).

(*z*) See *ante*, pp. 291—294.

(*a*) 2 Watk. Cop. 71. See as to freeholds, *ante*, p. 281.

Manor of
Cheltenham
is an excep-
tion.

Dower Act.

tirety (*b*) ; and, like dower under the old law, freebench is paramount to the husband's debts (*c*). Freebench, however, usually differs from the ancient right of dower in this important particular, that whereas the widow was entitled to dower of all freehold lands of which her husband was solely seised *at any time* during the coverture (*d*), the right to freebench does not usually attach until the actual decease of the husband (*e*), and it may be defeated by a devise of the lands by the will of the husband (*f*). Freebench, therefore, is in general no impediment to the free alienation by the husband of his copyhold lands, without his wife's concurrence. To this rule the important manor of Cheltenham forms an exception ; for, by the custom of this manor, as settled by Act of Parliament, the freebench of widows attaches, like the ancient right of dower out of freeholds, on all the copyhold lands of inheritance of which their husbands were tenants at any time during the coverture (*g*). The Act for the amendment of the law relating to dower (*h*) does not extend to freebench (*i*).

(*b*) 1 Scriv. Cop. 89.

(*c*) *Spyer v. Hyatt*, 20 Beav. 621.

(*d*) *Ante*, p. 295.

(*e*) 2 Watk. Cop. 73.

(*f*) *Lacey v. Hill*, L. R., 19 Eq. 846.

(*g*) *Doe d. Riddell v. Gwinell*,

1 Q. B. 632.

(*h*) Stat. 3 & 4 Will. IV. c. 105 ;
ante, p. 298.

(*i*) *Smith v. Adams*, 18 Beav. 499 ; 5 De Gex, M. & G. 712.

PART IV.

OF PERSONAL INTERESTS IN REAL ESTATE.

THE subjects which have hitherto occupied our attention derive a great interest from the antiquity of their origin. We have seen that the difference between freehold and copyhold tenure has arisen from the distinction which prevailed, in ancient times, between free tenure and tenure in villenage (*a*); and that estates of freehold in lands and tenements owe their origin to the ancient feudal system (*b*). The law of real property, in which term both freehold and copyhold interests are included, is full of rules and principles to be explained only by a reference to antiquity; and many of those rules and principles were, it must be confessed, much more reasonable and useful when they were first instituted than they are at present. The subjects, however, on which we are now about to be engaged, possess little of the interest which arises from antiquity; although their present value and importance are unquestionably great. The principal interests of a personal nature derived from landed property, are a term of years and a mortgage. The origin and reason of the personal nature of a term of years in land have been already attempted to be explained (*c*); and at the present day, leasehold interests in land, in which amongst other things all building leases are included, form a subject

(*a*) *Ante*, pp. 16, 43, 415.

(*b*) *Ante*, pp. 12—15, 41—43.

(*c*) *Ante*, pp. 16—20, 27, 28.

Mortgage.

sufficiently important to require a separate consideration. The personal nature of a mortgage was not clearly established till long after a term of years was considered as a chattel (*d*). But it is now settled that every mortgage, whether with or without a bond or covenant for the repayment of the money, forms part of the personal estate of the lender or mortgagee (*e*). And when it is known that the larger proportion of the lands in this kingdom is at present in mortgage, a fact generally allowed, it is evident that a chapter devoted to mortgages cannot be superfluous. It may be pointed out that mortgages, as well as leaseholds (*f*), are included in personal estate as passing to the executor or administrator, without reference to the question whether they are things specifically recoverable. As will be seen further on, the estate of a mortgagee may have the quality and incidents of real estate *at law*, but will nevertheless form part of his personal estate *in equity* (*g*).

(*d*) *Thornborough v. Baker*, 1 Cha. Ca. 238; 3 Swanst. 628, anno 1675; *Tabor v. Tabor*, 3 Swanst. 636.

(*e*) Co. Litt. 208 a, n. (1).

(*f*) *Ante*, pp. 25, 28.

(*g*) *Ante*, pp. 158, 173.

CHAPTER I.

OF A TERM OF YEARS.

At the present day, one of the most important kinds of chattel or personal interests in landed property is a term of years, by which is understood, not the time merely for which a lease is granted, but also the interest acquired by the lessee. Terms of years may practically be considered as of two kinds: first, those which are created by ordinary leases, which are subject to a yearly rent, which seldom exceed ninety-nine years, and in respect of which so large a number of the occupiers of lands and houses are entitled to their occupation; and secondly, those which are created by settlements, wills, or mortgage deeds, in respect of which no rent is usually reserved, which are frequently for one thousand years or more, which are often vested in trustees, and the object of which is usually to secure the payment of money by the owner of the land. But although terms of years of different lengths are thus created for different purposes, it must not, therefore, be supposed that a long term of years is an interest of a different nature from a short one. On the contrary, all terms of years of whatever length possess precisely the same attributes in the eye of the law.

The consideration of terms of the former kind, or those created by ordinary leases, may conveniently be preceded by a short notice of a tenancy at will, and a tenancy by sufferance. A tenancy at will may be created by parol (*a*), or by deed; it arises when a person

(a) Stat. 29 Car. II. c. 3, s. 1.

lets land to another, to hold at the will of the lessor or person letting (*b*). The lessee, or person taking the lands, is called a tenant at will; and, as he may be turned out when his landlord pleases, so he may leave when he likes. A tenant at will is not answerable for mere permissive waste (*c*). He is allowed, if turned out by his landlord, to reap what he has sown, or, as it is legally expressed, to take the emblements (*d*). But as this kind of letting is very inconvenient to both parties, it is scarcely ever adopted; and, in construction of law, a lease at an annual rent, made generally without expressly stating it to be at will (*e*), and without limiting any certain period, is not a lease at will, but a lease from year to year (*f*), of which we shall presently speak. As we have seen (*g*), the Courts of law considered one in possession of land as *cestui que trust* to be merely the tenant at will of his trustees (*h*); although he might have been absolutely entitled in equity. A tenancy by sufferance is when a person, who has originally come into possession by a lawful title, holds such possession after his title has determined.

Emblements.

Cestui que trust tenant at will.

Tenancy by sufferance.

Lease from year to year.

A lease from year to year is a method of letting very commonly adopted: in most cases it is much more advantageous to both landlord and tenant than a lease at will. The advantage consists in this, that both landlord and tenant are entitled to notice before the tenancy can be determined by the other of them (*i*). By the

(*b*) Litt. s. 68; 2 Black. Comm. 145.

(*c*) *Harnett v. Maitland*, 15 M. & W. 257.

(*d*) Litt. s. 68; see *Graves v. Weld*, 5 B. & Ad. 105.

(*e*) *Doe d. Bastow v. Cox*, 11 Q. B. 122; *Doe d. Dixie v. Davies*, 7 Ex. R. 89.

(*f*) *Right d. Flower v. Darby*, 1 T. Rep. 159, 163.

(*g*) *Ante*, p. 175.

(*h*) *Earl of Pomfret v. Lord Windsor*, 2 Ves. sen. 472, 481. See *Melling v. Leak*, 16 C. B. 652.

(*i*) As to the effect of an assignment of his interest by a tenant from year to year, see *Allcock v. Moorhouse*, 9 Q. B. D. 366.

common law, this notice must be given at least half a year before the expiration of the current year of the tenancy (*j*); for the tenancy cannot be determined by one only of the parties, except at the end of any number of whole years from the time it began. So that, if the tenant enter on any quarter day, he can quit only on the same quarter day: when once in possession, he has a right to remain for a year; and if no notice to quit be given for half a year after he has had possession, he will have a right to remain two whole years from the time he came in; and so on from year to year. But in the case of a tenancy from year to year of a holding, to which the Agricultural Holdings (England) Act, 1883 (*k*), applies, a year's notice, expiring with a year of tenancy, is now required, in order to determine the tenancy, by the 33rd section of the Act; unless the landlord and tenant of the holding by writing under their hands agree that this section shall not apply; in which case a half year's notice will be sufficient. This section, however, does not extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors (*l*). Under the same Act (*m*), a landlord may give a tenant from year to year notice to quit part only of his holding if the notice be given with a view to the use of the land for any of the improvements specified in the Act, and it be so stated in the notice; the tenant having the option, by counter notice in writing within twenty-eight days, to accept the same as notice to quit the entire holding. This Act does not apply to any holding which is not either wholly agricultural or wholly pastoral, or in part

Agricultural
Holdings
(England)
Act, 1883.

(*j*) *Right d. Flower v. Darby*, 1 T. R. 159, 163; and see *Doe d. Lord Bradford v. Watkins*, 7 East, 551.

(*k*) Stat. 46 & 47 Vict. c. 61; see *Barlow v. Teal*, 15 Q. B. D. 408, 501.

(*l*) The Agricultural Holdings

(England) Act, 1875, repealed by the Act of 1883, contained similar provisions; see stat. 33 & 39 Vict. c. 92, ss. 51, 54—58.

(*m*) Stat. 46 & 47 Vict. c. 61, s. 41. The Act of 1875 contained similar provisions; see stat. 38 & 39 Vict. c. 92, ss. 52, 54—58.

agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden; or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord (*n*). A lease from year to year can be made by parol or word of mouth (*o*), if the rent reserved amount to two-thirds at least of the full improved value of the lands; for if the rent reserved do not amount to so much, the Statute of Frauds declares that such parol lease shall have the force and effect of a lease at will only (*p*). A lease from year to year, reserving a less amount of rent, must be made by deed (*q*). The best way to create this kind of tenancy is to let the lands to hold "from year to year" simply, for much litigation has arisen from the use of more circuitous methods of saying the same thing (*r*).

Lease for a
number of
years.

A lease for a fixed number of years may, by the Statute of Frauds, be made by parol, if the term do not exceed three years from the making thereof, and if the rent reserved amount to two-thirds, at least, of the full improved value of the land (*s*). Leases for a longer term of years, or at a lower rent, were required, by the Statute of Frauds (*t*), to be put into writing and signed by the parties making the same, or their agents thereunto lawfully authorized by writing. But a lease of a separate incorporeal hereditament was always required to be made by deed (*u*). And the Act of 1845 to

(*n*) Stat. 46 & 47 Vict. c. 61, s. 54. The Act of 1875 applied to agricultural and pastoral holdings of two acres and upwards in extent; see stat. 38 & 39 Vict. c. 93, s. 58.

(*o*) *Legg v. Hackett*, Bac. Abr. tit. Leases (L. 3); *S. C.* nom. *Legg v. Strudwick*, 2 Salk. 414.

(*p*) 29 Car. II. c. 3, ss. 1, 2.

(*q*) Stat. 8 & 9 Vict. c. 106, s. 3.

(*r*) See Bac. Abr. tit. Leases and Terms for Years (L. 3); *Doe d. Clarke v. Smaridge*, 7 Q. B. 957.

(*s*) 29 Car. II. c. 3, s. 2; *Lord Bolton v. Tomlin*, 5 A. & E. 856.

(*t*) 29 Car. II. c. 3, s. 1.

(*u*) *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824; *S. C.* 4 Nev. & Man. 505. See *ante*, pp. 30, 31, 301.

amend the law of real property provided that a lease, ^{Leases in writing now required to be by deed.} required by law to be in writing, of any tenements or hereditaments, shall be void *at law*, unless made by deed (x). But such a lease, although void as a lease for want of its being by deed, may be good as an agreement to grant a lease, *ut res magis valeat quam pereat* (y). And since the Judicature Acts took effect (z), it has been held that a tenant in possession of land under an agreement for a lease, which he might enforce specifically in equity (a), is to be treated in every Court as if he were tenant of the land *at law* upon the terms of the agreement (b). A tenant under a mere agreement in writing (c) is thus placed practically in the same position as if he had a lease by deed. It does not require any formal words to make a ^{No formal words required to make a lease.} lease for years. The words commonly employed are "demise, lease, and to farm let;" but any words indicating an intention to give possession of the lands for a determinate time will be sufficient (d). Accordingly, it sometimes happened, previously to the Act of 1845, that what was meant by the parties merely as an agreement to execute a lease, was in law construed as itself an actual lease; and very many lawsuits arose out of the question, whether the effect of a memorandum was in law an actual lease, or merely an agreement to make one. Thus, a mere memorandum in writing that A. agreed to let, and B. agreed to take, a house or farm for so many years, at such a rent, was, if signed

(x) Stat. 8 & 9 Vict. c. 106, s. 8, repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

(y) *Parker v. Taswell*, 4 Jur., N. S. 168, affirmed, 2 De G. & J. 559; *Bond v. Rosling*, 1 B. & S. 371; *Tidy v. Mollett*, 16 C. B., N. S. 298; *Rollason v. Leon*, 7 H. & N. 78, overruling *Stratton v. Pettitt*, 16 C. B. 420.

(z) *Ante*, pp. 157, 158.

(a) See *ante*, p. 156; *Swain v.*

Ayres, 21 Q. B. D. 289.

(b) *Walsh v. Lonsdale*, 21 Ch. D. 9; *Furness v. Bond*, 4 Times L. R. 457; *Lowther v. Heaver*, 41 Ch. D. 248, 264; *Crump v. Temple*, 7 Times L. R. 120; *ante*, pp. 174, 175.

(c) See *ante*, p. 177.

(d) Bac. Abr. tit. Leases and Terms for Years (K); *Curling v. Mills*, 6 Man. & Gr. 173.

by the parties, as much a lease as if the most formal words had been employed (e). By such a memorandum a term of years was created in the premises, and was vested in the lessee, immediately on his entry, instead of the lessee acquiring, as at present, merely a right to have a lease granted to him in accordance with the agreement (f).

(e) *Poole v. Bentley*, 12 East, 168; *Doe d. Walker v. Groves*, 15 East, 244; *Doe d. Pearson v. Rias*, 8 Bing. 178; *S. C.* 1 Moo. & Scott, 259; *Warman v. Faithfull*, 5 B. & Ad. 1042; *Pearce v. Cheslyn*, 4 A. & E. 225.

(f) By the Stamp Act, 1891, leases, with some exceptions, are subject to an *ad valorem* duty on the rent reserved as follows:—

	If the term does not exceed 35 Years or is indefinite.	If the term being definite exceeds 35 Years, but does not exceed 100 Years.	If the term being definite exceeds 100 Years.
Where the yearly rent shall not exceed £5	s. d. 0 6	£ s. d. 0 3 0	£ s. d. 0 6 0
Shall exceed £5 and not exceed £10	1 0	0 6 0	0 12 0
" 10 " 15	1 6	0 9 0	0 18 0
" 15 " 20	2 0	0 12 0	1 4 0
" 20 " 25	2 6	0 15 0	1 10 0
" 25 " 50	5 0	1 10 0	3 0 0
" 50 " 75	7 6	2 5 0	4 10 0
" 75 " 100	10 0	3 0 0	6 0 0
And where the same shall exceed £100, then for every £50, and also for any fractional part of £50	5 0	1 10 0	3 0 0

And any premium which may be paid for the lease is also charged with the same *ad valorem* duty as on a conveyance upon the sale of lands for the same consideration. The counterpart bears a duty of five shillings, unless the duty on the lease is less than five shillings, in which case the counterpart bears the same duty as the lease; and if not executed by the lessor, it does not require any stamp denoting that the proper duty has been paid on the original. Agreements for leases for any term not exceeding thirty-five years are subject to the same duty as leases. Leases of furnished houses or apartments for any term less than a year, where the rent for such term exceeds 25*l.*, are subject to a duty of half-a-crown. And any lease of a dwelling-house or part thereof for any definite term not exceeding a year, at a rent not exceeding the rate of 10*l.* per annum, is now chargeable with the stamp duty of one penny only. Covenants in a lease to make improvements or additions to the property do not subject it to any additional duty. See stat. 54 & 55 Vict. c. 39, ss. 75—78, and 1st schedule, tit. Lease, replacing 33 & 34 Vict. c. 97, ss. 96—100, and schedule, tit. Lease.

There is no limit to the number of years for which a lease may be granted; a lease may be made for 99, 100, 1,000, or any other number of years; the only requisite on this point is, that there be a definite period of time fixed in the lease, at which the term granted must end (*g*); and it is this fixed period of ending which distinguishes a *term* from an estate of freehold. Thus, a lease to A. for his life is a conveyance of an estate of freehold, and must be carried into effect by the proper method for conveying the legal seisin; but a lease to A. for ninety-nine years, if he shall so long live, gives him only a term of years, on account of the absolute certainty of the determination of the interest granted, at a given time *fixed in the lease*. Besides the fixed time for the term to end, there must also be a time fixed from which the term is to begin; and this time may, if the parties please, be at a future period (*h*). Thus, a lease may be made for 100 years from next Christmas. For, as leases anciently were contracts between the landlords and their husbandmen, and the interests of tenants for years were treated as laying outside the law of freehold estates (*i*), no objection was made to the tenant's right of occupation being deferred to a future time.

A lease may be made for any number of years.

There must be a period fixed for the ending.

A term may be made to commence at a future time.

When the lease is made, the lessee does not become complete tenant by lease to the lessor until he has entered on the lands let (*k*). Before entry, he has no estate, but only a right to have the lands for the term by force of the lease (*l*), called in law an *interesse termini*. But if the lease should be made by a bargain and sale, or any other conveyance operating by virtue of the

Entry.

Interesse termini.
Bargain and sale.

(*g*) Co. Litt. 45 b; 2 Black. Comm. 143.

(*h*) 2 Black. Comm. 143.

(*i*) See *ante*, pp. 16—21, 27, 28, 60, 61.

(*k*) Litt. s. 58; Co. Litt. 46 b; *Miller v. Green*, 5 Bingh. 92; *ante*, pp. 186, 187.

(*l*) Litt. s. 459; Bac. Abr. tit. Leases and Terms for Years (M).

Statutes of Uses, the lessee will, as we have seen (*m*), have the whole term vested in him at once, in the same manner as if he had actually entered.

Lease for
years by
estoppel.

The circumstance, that a lease for years was anciently nothing more than a mere contract, explains a curious point of law relating to the creation of leases for years, which does not hold with respect to the creation of any greater interest in land. If a man should by indenture lease lands, in which he has no legal interest, for a term of years, both lessor and lessee will be *estopped* during the term, or forbidden to deny the validity of the lease. This might have been expected (*n*). But the law goes further, and holds, that if the lessor should at any time during the lease acquire the lands he has so let, the lease, which before operated only by estoppel, shall now take effect out of the newly-acquired estate of the lessor, and shall become for all purposes a regular estate for a term of years (*o*). If, however, the lessor has, at the time of making the lease, any interest in the lands he lets, such interest only will pass, and the lease will have no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant (*p*). Thus, if A., a lessee for the life of B., makes a lease for years by indenture, and afterwards purchases the reversion in fee, and then B. dies, A. may at law avoid his own lease, though several of the years expressed in the lease may be still to come; for, as A. had an interest in the lands for the life of B., a term of years determinable on B.'s life passed to the lessee. But if in such a case the lease was made for valuable consideration, Equity would

Exception,
where the
lessor has any
interest.

(*m*) *Ante*, p. 190.

(*n*) See *ante*, p. 144.

(*o*) Co. Litt. 47 b; Bac. Abr. *Strouds v. Seaton*, 2 C. M. & R. tit. Leases and Terms for Years 723, 730.

Austin, 7 Man. & Gr. 701.

(*p*) Co. Litt. 47 b; *Hill v.*

Saunders, 4 B. & C. 539; *Doe d.*

723, 730.

oblige the lessor to make good the term out of the interest he had acquired (*q*).

As we have seen, a tenant for a term of years has long enjoyed a true property in his holding; for he has the right to maintain or recover possession of his land during the term against all others, including his landlord (*r*). He also enjoys the right of free disposition of his holding, either by parting with his whole interest therein, which is termed an assignment, or by granting an estate for a shorter term than his own, which is called an underlease (*t*). But he may deprive himself of the power of exercising this right by agreement with his landlord. Thus his lease may have contained a covenant by him not to assign the demised premises without his landlord's licence; in which case he will be prevented from assigning, though not from underletting them without licence (*u*). Or he may have covenanted not to assign or underlet without licence, which will prevent either mode of disposition (*x*). With regard to the right of free enjoyment, it appears that, in the absence of express agreement, a tenant for years is properly in the same position as a tenant for life (*y*).

(*q*) 2 Prest. Abst. 217.

(*r*) *Ante*, pp. 2, 17, 18, 61, n. (*q*); 8 Black. Comm. ch. xi, xii; Bac. Abr. Trespass (C. 2).

(*t*) Bract. 11 b, 328 a; Perk. s. 91; Co. Litt. 46 b; Shep. Touch. 268; Bac. Abr. Leases (I. 8); *Church v. Brown*, 15 Ves. 258, 264; Cruise, Dig. iv. 88, 89, 4th ed.; *Buckland v. Papillon*, L. R., 1 Eq. 477, 2 Ch. 67.

(*u*) *Crusoe d. Blencowe v. Bugby*, 2 W. Bl. 766; 15 Ves. 265.

(*x*) See 15 Ves. 265; *Bain v. Fothergill*, L. R., 7 H. L. 158; Woodfall, Landlord & Tenant, ch. xvii. s. 2, p. 679, 14th ed.

(*y*) *Ante*, pp. 109—111; Co. Litt. 53, 54 a; 2 Inst. 144, 145, 299; 2 Black. Comm. 144, 288.

The old opinion was that a tenant for years was liable for permissive as well as voluntary waste; Litt. s. 71. But in modern times conflicting opinions have been expressed on this point; *Herne v. Bembow*, 4 Taunt. 764; *Yelton v. Gover*, 11 Ex. 274, 298, 294; *Woodhouse v. Walker*, 5 Q. B. D. 404, 406, 407; *Davies v. Davies*, 38 Ch. D. 499, 503, 504; *Re Cartwright*, 41 Ch. D. 532. As we have seen, it has now been decided that a tenant for life is not liable for permissive waste; *ante*, p. 110. And on principle this decision should govern the case of a tenant for years: though it may be pointed out that, anciently, tenants for

But in practice, the rights and liabilities of a tenant for years in respect of his enjoyment of the demised premises are almost always regulated by express agreement. Thus in agricultural leases the tenant generally enters into covenants as to the mode of cultivation of the land; in leases of houses, he usually covenants to repair, and sometimes to paint them also. Covenants restricting the use of the premises, as not to carry on certain trades thereon, or to use the same as a private dwelling-house only, are also met with (z).

Rent and
covenants in
leases.

Leases for years taken for the purpose of occupation are usually made subject to the payment of a yearly rent (a); and, as we have seen, they generally contain certain covenants by the lessee, amongst which a covenant to pay the rent is always included. Thus a lease is a matter partly of transfer of property, partly of contract. As a matter of contract, the lessee's covenant to pay rent and his other covenants remain constantly binding on him during the whole term, notwithstanding any assignment which he may make (b). On

life and years were equally in the position of farmers, while in modern times tenants for life are usually life-owners rather than farmers; see *ante*, pp. 2, n. (b), 3, n. (f), 41, n. (e), 107, 108.

(z) Here it may be mentioned that, under an agreement to take a lease with "the usual" covenants, or without specifying the covenants, the lessor can, as a rule, insist on the insertion in the lease of no other covenants by the lessee than covenants (1) to pay rent, (2) to pay taxes, except such as are expressly payable by the lessor, (3) to keep and deliver up the premises in repair, and (4) to allow the lessor to enter and view the state of repair. Leases for particular purposes (as farming, mining or public-house leases) should contain, besides, such covenants and clauses as are usually inserted in similar leases by the custom of the trade or the district. In the absence of express stipulation, the lessor is entitled to have a condition of re-entry on non-payment of rent, but not on breach of covenant. And the lessor is only bound to enter into the usual qualified covenant for quiet enjoyment. See Davidson, *Prec. Conv.*, vol. v. pt. i. pp. 50—54, 3rd ed.; *Hampshire v. Wickens*, 7 Ch. D. 555, 561; *Re Anderton & Milner's Contract*, 45 Ch. D. 476.

(a) *Ante*, p. 306.

(b) And the lessee remains liable

for the rent, after assignment, even without an express covenant

a sale of leasehold land by the lessee, the purchaser is therefore bound to enter into a covenant to indemnify the vendor against non-payment of the rent and non-observance of the covenants of the lease (c). And the assignee of a lease is bound so to indemnify the lessee, even without such a covenant (cc). The assignee, as such, is liable to the landlord for the rent which may be unpaid, and for the covenants which may be broken during the time that the term remains vested in him, although he may never enter into actual possession (d), provided that such covenants relate to the premises let (e): and a covenant to do any act upon the premises, as to build a wall, is binding on the assignee, if the lessee has covenanted for himself *and his assigns* to do the act (f). But a covenant to do any act upon premises not comprised in the lease cannot be made to bind the assignee (g). Covenants which are binding on the assignee are said to *run with the land*, the burden of such covenants passing with the land to every one to whom the term is from time to time assigned. But when the assignee assigns to another, his liability ceases as to any future breach (h). In the same manner the benefit of covenants relating to the land, entered into by the lessor, will pass to the assignee; for, though no contract has been made between the lessor and the assignee

Covenants
which run
with the land.

to pay it: but in such a case the lessor will be barred from suing the lessee for rent, if he accept the assignee as his tenant. This is no bar to his suing the lessee on express covenants. See *Walker's case*, 3 Rep. 22, 24; *Barnard v. Godscall*, Cro. Jac. 309; *Marsh v. Brace*, *ib.* 334; *Brett v. Cumberland*, *ib.* 521; *Bachelour v. Gage*, Cro. Car. 188; *Norton v. Acklane*, *ib.* 580; *Mills v. Auriol*, 1 H. Bl. 438, 443, 445; 4 T. R. 94, 98; *Mayor of Swansea v. Thomas*, 10 Q. B. D. 48; *Baynton v. Morgan*, 22 Q. B. D. 74.

(c) Sug. V. & P. 87, 14th ed.

(cc) *Burnett v. Lynch*, 5 B. &

C. 589; *Moule v. Garrett*, L. R. 5 Ex. 132.

(d) *Williams v. Bosanquet*, 1 Brod. & Bing. 288; 8 J. B. Moore, 500.

(e) As do, for example, the covenants specified in note (e) to p. 470, *ante*.

(f) *Spencer's case*, 5 Rep. 16 a; *Hemingway v. Fernandes*, 18 Sim. 228. See *Minshull v. Oaks*, 2 H. & N. 798, 809.

(g) *Keppel v. Bailey*, 2 My. & K. 517.

(h) *Taylor v. Shum*, 1 Bos. & Pul. 81; *Rowley v. Adams*, 4 M. & Cr. 584.

individually, yet as the latter has become the tenant of the former, a *privity of estate* is said to arise between them, by virtue of which the covenants entered into, when the lease was granted, become mutually binding, and may be enforced by the one against the other (*i*). This mutual right is also confirmed by an express clause of the statute before referred to (*k*), by which assignees of the reversion were enabled to take advantage of conditions of re-entry contained in leases (*l*). By the same statute also, the assignee of the reversion is enabled to take advantage of the covenants entered into by the lessee with the lessor, under whom such assignee claims (*m*),—an advantage, however, which, in some cases, he is said to have previously possessed (*n*). And with regard to leases made after the year 1861, the Conveyancing Act of 1881 contains further enactments (*o*) annexing the rent reserved and the benefit of the lessee's covenants, having reference to the subject-matter of the lease, to the immediate reversionary estate in the land and giving a remedy for such rent and covenants to the person entitled, subject to the term, to the income of the same reversionary estate; also laying the obligation of the lessor's covenants, with reference to the subject-matter of the lease, upon the immediate reversionary estate and the person entitled thereto, so far as the lessor has power to bind them; and allotting the like advantage and liability to every part of the reversionary estate, in the case of severance thereof.

Proviso for
re-entry.

The payment of the rent and the observance and

(*i*) 8 Rep. 28; *Stevenson v. Lambard*, 2 East, 575, 580; Sugd. Vend. & Pur. 478, note, 8rd ed.

(*k*) Stat. 32 Hen. VIII. c. 34, s. 2.

(*l*) *Ante*, p. 309.

(*m*) 1 Wms. Saund. 240, n. (8); *Martyn v. Williams*, 1 H. & N.

817.

(*n*) *Vyryan v. Arthur*, 1 Barn. & Cress. 410, 414.

(*o*) Stat. 44 & 45 Vict. c. 41, ss. 10, 11; see Williams's Conveyancing Statutes, 104—110; *Municipal &c. Building Society v. Smith*, 22 Q. B. D. 70.

performance of the covenants are usually further secured by a proviso or condition for re-entry (*p*). The proviso for re-entry, so far as it relates to the non-payment of rent, has been already adverted to (*q*); it enables the landlord or his heirs (and the statutes above mentioned (*r*) enable his assigns), to re-enter on the premises let, and repossess them as if no lease had been made. The landlord, his heirs or assigns, could formerly, on non-observance of any covenant, at once re-enter in the same way under the proviso for re-entry on breach of covenant (*s*). And, as a rule, the tenant could obtain no relief in equity against a forfeiture for breach of covenant, other than a covenant to pay money (*t*). A condition for re-entry on breach of covenant thus became a very serious instrument of oppression in the hands of the landlord, when the property comprised in the lease was valuable and the tenant had by mere inadvertence committed some breach of covenant (*u*). But now, by the Conveyancing Act of 1881 (*x*), a right of re-entry or forfeiture under any proviso or stipulation in a lease (*y*) for a breach of any covenant or condition in a lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and

(*p*) See *ante*, p. 470, n. (*s*).

(*q*) *Ante*, p. 307.

(*r*) Stats. 32 Hen. VIII. c. 34; 44 & 45 Vict. c. 41, ss. 10, 14 (sub-s. 8); *ante*, p. 309.

(*s*) *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Davis v. Burrell*, 10 C. B. 821.

(*t*) *Hill v. Barclay*, 18 Ves. 56; *Nokes v. Gibbon*, 3 Drew. 681; *Barrow v. Isaacs*, 1891, 1 Q. B. 417; see *Bamford v. Cressy*, 3 Giff. 675; *Bargent v. Thomson*, 4 Giff. 473.

(*u*) See note (*s*), *ante*.

(*x*) Stat. 44 & 45 Vict. c. 41, s. 14; see Williams's Conveyancing Statutes, 114—119. This Act repealed stats. 22 & 23 Vict. c. 35, ss. 4—9; 23 & 24 Vict. c. 126, s. 2; which had given power to the Courts, under certain conditions, to relieve against a forfeiture for breach of a covenant or condition to insure against fire.

(*y*) See sect. 14, sub-s. 3; *Swain v. Ayres*, 21 Q. B. D. 289.

the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach (*z*). And the Court is authorized, on the application of the lessee (*a*), to grant relief against such a forfeiture, if and upon such terms as the Court, under the circumstances of the case, shall think fit. These provisions apply to all leases, whatever their date, and have effect notwithstanding any stipulation to the contrary. But they do not affect the law relating to re-entry or forfeiture, or relief in case of non-payment of rent (*b*). Nor do they apply to a covenant or condition against the assigning, underletting, parting with the possession or disposing of the land leased (*c*); or to a condition for forfeiture on the bankruptcy of the lessee (*d*), or on the taking in execution of the lessee's interest; or, in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

Effect of
licence for
breach of
covenant.

At common law, the proviso for re-entry on breach of covenants was the subject of a curious doctrine; that if an express licence were once given by the landlord for the breach of any covenant, or if the covenant were, not to do a certain act without licence, and licence were once given by the landlord to perform the act, the right of re-entry was gone for ever (*e*). The ground of this doctrine was, that every condition of re-entry was entire and indivisible; and, as the condition had been waived

(*z*) See *North London &c. Co. v. Jacques*, 49 L. T. 659; *Jacques v. Harrison*, 12 Q. B. D. 186, 165; *Greenfield v. Hanson*, 2 Times L. R. 876; *Skinner's Co. v. Knight*, 1891, 2 Q. B. 542.
(*a*) See sect. 14, sub-s. 8; *Burt v. Gray*, 1891, 2 Q. B. 98.

(*b*) *Ante*, pp. 307, 308.
(*c*) *Barrow v. Isaacs*, 1891, 1 Q. B. 417.
(*d*) *Ex parte Gould, Re Walker*, 18 Q. B. D. 454.
(*e*) *Dumport's case*, 4 Rep. 119; *Brummell v. Macpherson*, 14 Ves. 178.

once, it could not be enforced again. So far as this reason extended to the breach of any covenant, it was certainly intelligible; but its application to a licence to perform an act, which was only prohibited when done *without* licence, was not very apparent (*f*). This rule, which was well established, was frequently the occasion of great inconvenience to tenants; for no landlord could venture to give a licence to do any act, which might be prohibited by the lease unless done with licence, for fear of losing the benefit of the proviso for re-entry, in case of any future breach of covenant (*g*). But in 1859 this inconvenient doctrine was removed by Lord St. Leonards' Act (*h*); and the giving of any such licence no longer prevents the enforcement of the landlord's right of re-entry for any breach of covenant not authorised or avoided by the licence. This Act, however, failed to provide for the case of an actual waiver of a breach of covenant. On this point the law stood thus. The receipt of rent by the landlord, after notice of a breach of covenant committed by his tenant prior to the rent becoming due, was an implied waiver of the right of re-entry (*i*); but if the breach was of a continuing kind, this implied waiver did not extend to the breach which continued after the receipt (*k*). An implied waiver of this kind did not destroy the condition of re-entry (*l*); but an actual waiver had this effect.

Waiver of a
breach of
covenant.

Implied
waiver.
Continuing
breach.

(*f*) 4 Jarman's Conveyancing, by Sweet, 377, n. (*e*).

(*g*) The only method to be adopted in such a case was, to create a fresh proviso for re-entry on any future breach of the covenants, a proceeding which was of course attended with expense. The term would then, for the future, have been determinable on the new events stated in the proviso; and there was no objection in point of law to such a course; for a term, unlike an estate of freehold, may be made determinable during its continu-

ance, on events which were not contemplated at the time of its creation. See 2 Prest. Conv. 199.

(*h*) Stat. 22 & 23 Vict. c. 35, ss. 1, 2. By stat. 8 & 9 Vict. c. 99, s. 5, the doctrine ceased to extend to licences granted to the tenants of Crown lands.

(*i*) Co. Litt. 211 b; *Price v. Worwood*, 4 H. & M. 512.

(*k*) *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Doe d. Baker v. Jones*, 5 Ex. 498.

(*l*) *Doe d. Flower v. Peak*, 1 B. & Ad. 428.

**Actual
waiver.**

Few landlords therefore were disposed to give an actual waiver. This inconvenience was met by a subsequent Act (*m*), providing that in future any actual waiver by the lessor, in any particular instance, of the benefit of any covenant or condition in any lease, should not be deemed to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect should appear.

**Severance of
reversion.**

At common law too, a grantee of the reversion of part of the property comprised in a lease could not take advantage of a condition of re-entry or other condition contained in the lease; as if a lease had been made of three acres, reserving a rent upon condition, and the reversion of two acres were granted, the rent might be apportioned but the condition was destroyed, "for that it is entire and against common right" (*n*). The law on this point was partially altered by Lord St. Leonards' Act, which provides (*o*), that where the reversion upon a lease is severed, and the rent is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent belonging to him, have the benefit of all conditions of re-entry for non-payment of the original rent. It will be observed that this enactment does not affect conditions of re-entry on breach of covenants; also, that it can only take effect, if the rent be legally apportioned. Rent can only be legally apportioned by the consent of the tenant to the apportionment, or by the verdict of a jury (*p*). But with regard to leases made after the year 1881, the common law rule is altogether abolished by the Conveyancing Act of 1881 (*q*), which provides that every condition or right of re-entry and every other

(*m*) Stat. 28 & 24 Vict. c. 88, s. 8.

(*n*) Co. Litt. 215 a. See as to coparceners, *Doe d. De Rutzen v. Lewis*, 5 A. & E. 277.

(*o*) Stat. 22 & 23 Vict. c. 35,

s. 8.

(*p*) *Bliss v. Collins*, 5 B. & A. 376. See *ante*, p. 401.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 12; see also s. 10.

condition contained in such leases shall, on the severance of the reversionary estate in the land leased, be apportioned and remain annexed to the several parts of the reversionary estate as severed.

It was provided by the Statute of Frauds (*r*), that no leases, estates or interests, not being copyhold or customary interests, in any lands, tenements or hereditaments, should be assigned, unless by deed or note in writing, signed by the party so assigning or his agent thereunto lawfully authorized by writing, or by act or operation of law. And now, by the Act to amend the law of real property (*s*), it is enacted that an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed (*t*).

Statute of Frauds required writing to assign a lease.
A deed now required.

Leasehold estates, being chattels, could always be bequeathed by will (*u*). And, as we have seen (*x*), they devolve in the first place on the executors of the will, in the same manner as other personal estate; or, on the decease of their owner intestate, they will pass to his administrator. An explanation of this part of the subject will be found in the author's treatise on the principles of the law of personal property (*y*). It was formerly a rule that where a man had lands in fee simple, and also lands held for a term of years, and devised by his will all his lands and tenements, the fee simple lands only passed by the will, and not the leaseholds; but if he had leasehold lands, and none held in fee simple, the leaseholds would then pass, for otherwise the will would

Will of leaseholds.
General devise.

(*r*) 29 Car. II. c. 3, s. 3.

(*s*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

(*t*) Any assignment of a lease upon any other occasion than a sale or mortgage appears now to

be subject to a deed stamp of 10s. Stat. 54 & 55 Vict. c. 39, replacing 33 & 34 Vict. c. 97.

(*u*) *Ante*, p. 20.

(*x*) *Ante*, pp. 20, 28.

(*y*) Part IV. Chaps. iii, iv, pp. 417, 460, 18th ed.

Wills Act.

be merely void (*z*). But the Wills Act of 1837 (*a*) now provides, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates of the testator, or his leasehold estates to which such description shall extend, as well as freehold estates, unless a contrary intention shall appear by the will.

Alienation
for debt.

As chattels, leasehold estates have always been liable to alienation for the tenant's debts, both during his life in execution of a judgment against him (*b*), and after his death (*c*). On a judgment against a tenant for years, his term may be seized and sold by the sheriff as a chattel under the writ of *feri facias* (*d*). And by the old law, execution might be had under the writ of *elegit* (*e*) of the whole of a debtor's term, as a chattel, or of half of it, as land (*f*). But at common law, judgments were no more binding on lands held for a term of years than on other chattels (*g*); which, by the Statute of Frauds, were not bound by judgments until a writ of execution was actually in the hands of the sheriff or his officer (*h*). By the Act of 1838 extending

(*a*) *Rose v. Bartlett*, Cro. Car. 292; see *ante*, pp. 21, 22.

(*a*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 26. See *Wilson v. Eden*, 5 Exch. 752; 18 Q. B. 474; 16 Beav. 153; *Prescott v. Barker*, L. R., 9 Ch. 174.* Stat. 22 & 23 Vict. c. 85, s. 27, contains a provision for the exoneration of the executors or administrators of a lessee from liability to the rents and covenants of the lease, similar to that to which we have already referred with respect to their liability to rents-charge in conveyances on rents-charge; see *ante*, p. 402, n. (*y*); *Re Green*, 2

De Gex, F. & J. 121.

(*b*) Bac. Abr. Execution (C. 2, 4).

(*c*) *Ante*, pp. 19, 20.

(*d*) 4 Rep. 74; *Taylor v. Cole*, 3 T. R. 292; see *Doe d. Hughes v. Jones*, 9 M. & W. 872; *ante*, p. 244.

(*e*) *Ante*, p. 244 and note (*h*).

(*f*) 8 Rep. 171; Bac. Abr. Execution (C. 2).

(*g*) 8 Rep. 171; *Shirley v. Watts*, 8 Atk. 200.

(*h*) Stat. 29 Car. II. c. 3, s. 16. See Williams on Personal Property, 70, 18th ed.

* Exoneration of executors and administrators of lessee.

creditors' remedies, lands held for a term were made liable to judgments against the tenant in the same manner as freehold lands (*i*): but as against purchasers without notice of any judgments, such judgments were to have no further effect than they would have had under the old law (*k*). And the before-mentioned Acts of 1860, 1864 and 1888, reducing the lien of judgments, apply to leaseholds equally with freeholds (*l*). By the common law, terms of years are not bound by the tenants' debts to the Crown, until award of execution against him (*m*). And purchasers of terms are now further protected by the before-mentioned provision of the Crown Suits Act of 1865 (*n*). Terms have always been liable to alienation for debt on the tenant's bankruptcy (*o*). But as leases for years, by reason of their rent and covenants, are sometimes more burdensome than profitable, under the old bankrupt law, a bankrupt's term did not vest in his assignees (who occupied a position similar to that of the present creditors' trustee) without their acceptance of it (*p*). As we have seen, under the Bankruptcy Act, 1883 (*q*), when a debtor is adjudged bankrupt, the whole of his property vests at once in the trustee for the purposes of the Act. But the trustee may, within the time and under the conditions specified in the Act, disclaim any part of the property of the bankrupt which consists of land of any tenure burdened with onerous covenants, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the pay-

Crown debts.

Bankruptcy.

Disclaimer of leaseholds by trustee in bankruptcy.

(*i*) *Ante*, pp. 246, 247.

(*k*) Stat. 2 & 3 Vict. c. 11, s. 5; *Westbrook v. Blythe*, 8 E. & B. 737. And if leaseholds should be considered to be *goods* within the meaning of stat. 19 & 20 Vict. c. 97, s. 1, then a purchaser without notice was thereby protected, if he acquired title at any time before an actual seizure under the

writ.

(*l*) *Ante*, pp. 248—250.

(*m*) *Fleetwood's case*, 8 Rep. 171; 13 Price, 659; Chitty, Prerogative of the Crown, 284, 297, 298.

(*n*) *Ante*, p. 261.

(*o*) *Ante*, pp. 253, 254.

(*p*) Bac. Abr. Bankrupt (F).

(*q*) *Ante*, p. 254.

ment of any sum of money (*r*). In the event of a disclaimer by the trustee of the bankrupt's leasehold property, the Court may, under the conditions specified in the Act, make an order vesting the same in any other person entitled thereto (*s*).

Underlease.

It has been mentioned (*ss*) that a tenant for years may, unless restrained by express covenant, make an assignment of his whole term, or an underlease for any part thereof. Any assignment for less than the whole term is in effect an underlease (*t*). On the other hand, any assurance purporting to be an underlease, but which comprises the whole term, is, by the better opinion, in effect an assignment (*u*). It is true that in some cases, where a tenant for years, having less than three years of his term to run, has orally agreed with another person to transfer the occupation of the premises to him for the rest of the term, he paying an equivalent rent, this has been regarded as an underlease, and so valid (*x*), rather than as an attempted assignment which would be void, formerly for want of a writing (*y*), and now for want of a deed (*z*). It is, however, held that no distress can be made for the rent thus reserved (*a*). But if a

Underlease
for the whole
term.

No distress
can be made.

(*r*) See stat. 46 & 47 Vict. c. 52, s. 55, amended by 58 & 54 Vict. c. 71, s. 13; Bankruptcy Rules, 1890, No. 69; W. N. 18th Dec. 1890. As to the previous law, see stats. 32 & 33 Vict. c. 71, s. 23; 12 & 13 Vict. c. 106, s. 145; 6 Geo. IV. c. 16, s. 75; Bac. Abr. Bankrupt (F).

(*s*) Stat. 46 & 47 Vict. c. 52, s. 55, sub-s. 6, amended by 58 & 54 Vict. c. 71, s. 13; *Re Finley*, 21 Q. B. D. 475; *Re Morgan*, 22 Q. B. D. 592; *Re Smith, Ex parte Hepburn*, 25 Q. B. D. 586.

(*ss*) *Ante*, p. 469.

(*t*) See Sugd. Concise Vendors, 482; *Cottee v. Richardson*, 7 Ex. Rep. 148.

(*u*) *Palmer v. Edwards*, 1 Doug. 187, n.; *Parmenter v.*

Webber, 8 Taunt. 593; 2 Prest. Conv. 124; *Thorn v. Woolcombe*, 3 B. & Ad. 586; *Lanford v. Selmes*, 3 K. & J. 220, 227; *Beaumont v. Marquis of Salisbury*, 19 Beav. 198, 210; *Beardman v. Wilson*, L. R., 4 C. P. 57.

(*x*) *Poultney v. Holmes*, 1 Strange, 405; *Preece v. Corrie*, 5 Bing. 27; *Pollock v. Stacy*, 9 Q. B. 1033.

(*y*) Stat. 29 Car. II. c. 3, s. 3; *ante*, p. 477.

(*z*) Stat. 8 & 9 Vict. c. 106, s. 8; *ante*, p. 477.

(*a*) Bac. Abr. tit. Distress (A); *— v. Cooper*, 2 Wilson, 375; *Preece v. Corrie*, 5 Bing. 24; *Puscos v. Puscos*, 8 Bing. N. C. 598.

tenure be created, the lord, if he have no estate, must at least have a seignior (b), to which the rent would by law be incident; and being thus rent service, it must by the common law be enforceable by distress (c). The very fact, therefore, that no distress can be made for the rent by the common law, shows that there can be no tenure between the parties. And, if so, the attempted disposition cannot operate as an underlease (d). If, however, the disposition be by deed, and be executed by the alienee, it has been decided that the reservation of rent may operate to create a rent-charge (e), for which the owner may sue (f), and which he may assign, so as to entitle the assignee to sue in his own name (g). And if this be so, there seems no good reason why, under these circumstances, the statutory power of distress given to the owner of a rent seck (h) should not apply to the rent thus created (i). But on this point also opinions differ (k). If such a rent be created after the year 1881, it would appear to be recoverable by means of the remedies conferred by the 44th section of the Conveyancing Act of 1881 (l).

Every underlessee becomes tenant to the lessee who grants the underlease, and not tenant to the original lessor. Between him and the underlessee, no *privity* is said to exist. Thus the original lessor cannot maintain any action against an underlessee for any breach of the covenants contained in the original lease (m). His

No privity between the lessor and the underlessee.

(b) *Ante*, p. 386.

(c) *Litt.* sect. 213.

(d) *Barrett v. Rolph*, 14 M. & W. 348, 352.

(e) *Ante*, p. 394.

(f) *Baker v. Gostling*, 1 Bing. N. C. 19.

(g) *Williams v. Hayward*, 1 E. & E. 1040.

(h) Stat. 4 Geo. II. c. 28, s. 5; *ante*, pp. 393, 396.

(i) *Puscoe v. Puscoe*, 3 Bing. N. C. 905.

W.R.P.

(k) See — *v. Cooper*, 2 Wils. 875; *Langford v. Selmes*, 3 K. & J. 220; *Smith v. Watts*, 4 Drew. 338; *Wills v. Catling*, 7 W. R. 448; *Burton's Compendium*, pl. 1111.

(l) Stat. 44 & 45 Vict. c. 41; *ante*, p. 397; see *Williams's Conveyancing Statutes*, 216, 217.

(m) *Holford v. Hatch*, 1 Dougl. 183. If, however, the lease contain covenants restricting the use of the land, an underlessee, being

Derivative term is not an estate in original term.

remedy is only against the lessee, or any assignee from him of the whole term. The derivative term, which is vested in the underlessee, is not an estate in the interest originally granted to the lessee: it is a new and distinct term, for a different, because a less, period of time. It certainly arises and takes effect out of the original term, and its existence depends on the continuance of such term, but still, when created, it is a distinct chattel, in the same way as a portion of any moveable piece of goods becomes, when cut out of it, a separate chattel personal.

Husband's rights in his wife's term at common law.

By the common law, if a married woman were possessed of a term of years, her husband might dispose of it at any time during the coverture, either absolutely or by way of mortgage (*n*); and if he survived her, he became entitled to it by his marital right (*o*). But if he died in her lifetime, it survived to her, and his will alone was not sufficient to deprive her of it (*p*). And if a trustee were possessed of a term of years on trust for a married woman, equity gave her husband similar rights over her equitable interest therein (*q*); subject however to the assertion by the wife of her equity to a settlement, or right to have a provision secured for herself and her children by settlement of the rents and profits of the term, or part thereof, on trust for that purpose (*r*). But if the trust were for the wife's separate use, she was entitled to enjoy and dispose of her

Wife's equitable interest in a term of years.

Wife's equity to a settlement.

held to have constructive notice of his lessor's title, may be restrained from contravening the covenants, under the doctrine permitting restrictions as to the use of land to be a burden on the land in equity; *ante*, p. 176; *Pitman v. Harland*, 17 Ch. D. 853; see *Hall v. Ewin*, 87 Ch. D. 74.

(*n*) *Hill v. Edmonds*, 5 De Gex & S. 603, 607.

(*o*) Co. Litt. 46 b, 351 a; see *ante*, p. 281; Williams's Convey-

ancing Statutes, 374, 375, 452.

(*p*) 2 Black. Comm. 434; 1 Rep. Husb. & Wife, 176, 177; *Doe d. Shaw v. Steward*, 1 A. & E. 300.

(*q*) *Donne v. Hart*, 2 R. & M. 860; *Re Bellamy, Elder v. Pearson*, 25 Ch. D. 620; see *Duberly v. Day*, 16 Beav. 33; 16 Jur. 581.

(*r*) *Hanson v. Keating*, 4 Hare, 1; see Williams on Personal Property, p. 486, 13th ed.

interest as fully as if she were a feme sole (*s*). And now, if a term of years or any equitable interest therein belong to a married woman as her separate property under the Married Women's Property Act, 1882, she will be entitled to hold and dispose of the same in the same manner as if she were a feme sole (*t*).

In many cases landlords, particularly corporations, are in the habit of granting to their tenants fresh leases, either before or on the expiration of existing ones. In other cases a covenant is inserted to renew the lease on payment of a certain fine for renewal; and this covenant may be so worded as to confer on the lessee a perpetual right of renewal from time to time as each successive lease expires (*u*). In all these cases the acceptance by the tenant of the new lease operates as a surrender in law of the unexpired residue of the old term; for the tenant by accepting the new lease affirms that his lessor has power to grant it; and as the lessor could not do this during the continuance of the old term, the acceptance of such new lease is a surrender in law of the former. But if the new lease be void, the surrender of the old one will be void also; and if the new lease be voidable, the surrender will be void if the new lease fail (*x*). It appears to be now

Renewable
leases.

Surrender
in law.

(*s*) See *ante*, pp. 288—290. The Married Women's Property Act, 1870 (stat. 33 & 34 Vict. c. 93, s. 7, now repealed, see *ante*, p. 290), provided that, where any woman married after the passing of the Act (9th Aug. 1870) should during her marriage become entitled to any personal property (which would seem to include leaseholds) as next of kin or one of the next of kin of an intestate, such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use. See

Williams's Conveyancing Statutes, 878, 882.

(*t*) Stat. 45 & 46 Vict. c. 75, ss. 1 (sub-s. 1), 2, 5; *ante*, pp. 291—294; see Williams's Conveyancing Statutes, 882, 883, 418, 421.

(*u*) *Iggulden v. May*, 9 Ves. 335; 7 East, 237; *Hare v. Burges*, 4 K. & J. 45.

(*x*) *Joe's case*, 5 Rep. 11 b; *Roe d. Earl of Berkeley v. Archbishop of York*, 8 East, 86; *Doe d. Earl of Egremont v. Courtenay*, 11 Q. B. 702; *Doe d. Biddulph v. Poole*, 11 Q. B. 718.

settled, after much difference of opinion, that the granting of a new lease to another person with the consent of the tenant is an implied surrender of the old term (*y*). Whenever a lease, renewable either by favour or of right, is settled in trust for one person for life with remainders over, or in any other manner, the benefit of the expectation or right of renewal belongs to the persons from time to time beneficially interested in the lease: and if any other person should, on the strength of the old lease, obtain a new one, he will be regarded in equity as a trustee for the persons beneficially interested in the old one (*z*). So the costs of renewal are apportioned between the tenant for life and remaindermen according to their respective periods of actual enjoyment of the new lease (*a*). Special provisions have been made by Parliament for facilitating the procuring and granting of renewals of leases when any of the parties are infants, idiots or lunatics (*b*); also for enabling trustees of renewable leaseholds to renew the leases, and to raise money by mortgage to pay for such renewal (*c*). A statute of the year 1860 (*d*) made provision for facilitating the purchase by trustees of renewable leaseholds of the reversion of the land, when it belongs to an ecclesiastical corporation, and for raising money for that purpose by sale or mortgage; also for the exchange of part of the lands, comprised in any renewable lease, for the rever-

(*y*) See *Lyon v. Reed*, 18 M. & W. 285, 306; *Creagh v. Blood*, 3 Jones & Lat. 183, 160; *Nickells v. Atherstone*, 10 Q. B. 944; *McDonnell v. Pope*, 3 Hare, 705; *Davison v. Gent*, 1 H. & N. 744.

(*z*) *Rawe v. Chichester*, Ambl. 715; *Giddings v. Giddings*, 3 Russ. 241; *Tanner v. Elworthy*, 4 Beav. 487; *Clegg v. Fishwick*, 1 Mac. & G. 294. See *ante*, pp. 172, 173.

(*a*) *White v. White*, 5 Ves. 554; 9 Ves. 560; *Allan v. Back-*

house, 2 V. & B. 65; Jac. 631; *Greenwood v. Evans*, 4 Beav. 44; *Jones v. Jones*, 5 Hare, 440; *Hadleston v. Whalpdale*, 9 Hare, 775; *Ainslie v. Harcourt*, 28 Beav. 318; *Bradford v. Brownjohn*, 1. R., 8 Ch. 711.

(*b*) Stats. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 14—18, 20, 21; 53 Vict. c. 5, ss. 116, 120—124.

(*c*) Stat. 51 & 52 Vict. c. 59, ss. 10, 11.

(*d*) Stat. 23 & 24 Vict. c. 124, ss. 35—39.

sion in other part of the same lands, so as thus to acquire the entire fee simple in a part of the lands instead of a renewable lease of the whole. As we have seen, capital money arising under the Settled Land Act, 1882, may be applied in purchase of the reversion or freehold in fee of any settled leasehold land; and the tenant for life now has power to exchange any part of the settled land for other land (*e*).

Before the year 1876 the tenant of an agricultural holding had no right to exact compensation from his landlord for any improvements (*f*) which he might have made during his tenancy; except under an express agreement with the landlord or by virtue of the custom of the country where the holding lay (*g*). An Act of 1875 (*h*) made provision for the compensation of tenants of agricultural holdings for improvements made by them. But the operation of that Act might be excluded by agreement between landlord and tenant (*i*); and in practice this was usually done. The Act was repealed by the Agricultural Holdings (England) Act, 1883 (*k*), which came into force on the 1st of January, 1884 (*l*). Under the Act of 1883 (*m*), where the tenant (*n*) of a holding, to which the Act applies (*o*), has made

Compensation
to tenants for
their im-
provements.

(*e*) *Ante*, p. 117, n.

(*f*) As to the removal of buildings and fixtures erected by a tenant for agricultural purposes, see Williams on Personal Property, 22, 13th ed.

(*g*) See *Hutton v. Warren*, 1 M. & W. 466; notes to *Wigglesworth v. Dallison*, 1 Smith, L. C.; Woodfall on Landlord and Tenant, ch. xx., sects. 4, 5, pp. 774, *et seq.*, 14th ed.; *Bradburn v. Foley*, 3 C. P. D. 123, 124.

(*h*) Stat. 38 & 39 Vict. c. 92, amended by stat. 39 & 40 Vict. c. 74.

(*i*) See stat. 38 & 39 Vict. c. 92, ss. 54—57.

(*k*) Stat. 46 & 47 Vict. c. 61, amended by 53 & 54 Vict. c. 26.

(*l*) Stat. 46 & 47 Vict. c. 61, s. 53.

(*m*) Sect. 1.

(*n*) By sect. 61, in this Act "tenant" means the holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year.

(*o*) See sect. 54, *ante*, p. 468. Stat. 50 & 51 Vict. c. 26 secures to the tenants of allotments of not more than two acres cultivated as a farm or garden compensation for crops left in the ground at the end of their tenancies.

thereon after the commencement of the Act (*p*) any improvement of the kind specified in the Act, he is entitled on quitting his holding at the determination of his tenancy to obtain from the landlord, as compensation under this Act for such improvement, such sum as fairly represents the value of the improvement to an incoming tenant (*q*). Compensation is not payable under this Act for the erection of buildings and other permanent improvements specified in the Act, unless executed with the consent in writing of the landlord or his agent previously obtained (*r*); or for drainage, unless the tenant has complied with the conditions of the Act in giving to the landlord or his agent due notice of intention to execute such an improvement (*s*). But compensation may be obtained for the improvement of the land by the application of purchased manure and in other ways described in the Act, although the consent of the landlord should not have been obtained (*t*). For improvements of the kind last-mentioned, fair and reasonable compensation, payable under an agreement in writing, may be substituted for compensation under the Act (*u*). And in the case of a tenancy under a contract of tenancy current at the commencement of the Act (*x*), where any agreement in writing, or custom, or the Act of 1875, provides specific compensation for any improvement described in the Act of 1883, compensation in respect of such improvement is to be payable in pursuance of such agreement, custom, or Act of 1875, in substitution for compensa-

(*p*) See sect. 2, as to improvements executed before the commencement of the Act.

(*q*) The amount and mode and time of payment of compensation is to be settled by agreement, or by arbitration as prescribed by the Act in case of difference; ss. 8—22. As to an appeal, see s. 28.

(*r*) Sect. 3, and First Schedule,

Part I.

(*s*) Sect. 4, and First Schedule, Part II.

(*t*) See First Schedule, Part III. The Act contains special provisions as to compensation for improvements begun during the last year of the tenancy; see s. 59.

(*u*) See sect. 5.

(*x*) See s. 61.

tion under the Act of 1883 (*y*). But any agreement made by a tenant, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement described therein (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) is void, both at law and in equity, so far as it deprives him of such right (*z*).

A landlord, on paying compensation under this Act, or compensation authorized by this Act to be substituted therefor, or on expending such an amount as may be necessary to execute an improvement by drainage, which the landlord has undertaken to execute himself in accordance with this Act (*a*), may obtain an order from the County Court charging the holding, or any part thereof, with the repayment of the amount paid or expended with such interest and by such instalments, and with such directions for giving effect to the charge, as the Court thinks fit (*b*). Such a charge must now be registered in the office of Land Registry in order to be valid as against a purchaser for value of the land, in the same manner as a land improvement rentcharge (*c*). Where the landlord is entitled as trustee, or otherwise than for his own benefit, compensation is not recoverable against him personally, but may be recovered by means of a charge on the holding obtained by the tenant in his own favour in the County Court (*cc*).

Power to charge holding with repayment.

Trustee landlord.

(*y*) Sect. 5.

(*z*) Sect. 55. By sect. 57, a tenant is not entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act; but where he is not entitled to compensation under or in pursuance of this Act, he may recover com-

penation under any other Act, or any agreement or custom, in the same manner as if this Act had not passed.

(*a*) See sect. 4.

(*b*) Sect. 29; *Gough v. Gough*, 1891, 2 Q. B. 665; see also ss. 20—32. The Act of 1875 contained similar provisions.

(*c*) Stat. 51 & 52 Vict. c. 51, ss. 4, 13, 18; *ante*, p. 122.

(*cc*) 46 & 47 Vict. c. 61, s. 81. It

Long terms
of years.

We now come to consider those long terms of years of which frequent use is made in conveyancing, generally for the purpose of securing the payment of money. For this purpose it is obviously desirable that the person who is to receive the money should have as much power as possible of realizing his security, whether by receipt of the rents or by selling or pledging the land; at the same time it is also desirable that the ownership of the land, subject to the payment of the money, should remain as much as possible in the same state as before, and that when the money is paid, the persons to whom it was due should no longer have anything to do with the property. These desirable objects are accomplished by conveyancers by means of the creation of a long term of years, say 1,000, which is vested (when the parties to be paid are numerous, or other circumstances make such a course desirable), in trustees, upon trust out of the rents and profits of the premises, or by sale or mortgage thereof for the whole or any part of the term, to raise and pay the money required, as it may become due, and upon trust to permit the owners of the land to receive the residue of the rents and profits. By this means the parties to be paid have ample security for the payment of their money. Not only have their trustees the right to receive on their behalf (if they think fit) the whole accruing income of the property, but they have also power at once to dispose of it for 1,000 years to come, a power which is evidently almost as effectual as if they were enabled to sell the fee simple. Until the time of payment comes, the owner of the land is entitled on the other hand, to receive the rents and profits, by virtue of the trust under which the trustees may be compelled to permit him so to do. So, if part of the rents should be required, the residue must be paid over to the owner; but if non-payment by the owner

The parties
have ample
security.

appears that such a charge should be registered in the same manner as a landlord's charge.

should render a sale necessary, the trustees will be able to assign the property, or any part of it, to any purchaser for 1,000 years without any rent. But until these measures may be enforced, the ownership of the land, subject to the payment of the money, remains in the same state as before. The trustees, to whom the term has been granted, have only a chattel interest; the legal seisin of the freehold remains with the owner, and may be conveyed by him, or devised by his will, or will descend to his heir, in the same manner as if no term existed, the term all the while still hanging over the whole, ready to deprive the owners of all substantial enjoyment, if the money should not be paid.

The ownership of the land, subject to the payment, remains as before.

If, however, the money should be paid, or should not ultimately be required, different methods may be employed of depriving the trustees of all power over the property. The first method, and that most usually adopted in modern times, is by inserting in the deed, by which the term is created, a proviso that the term shall cease, not only at its expiration by lapse of time, but also in the event of the purposes for which it is created being fully performed and satisfied, or becoming unnecessary, or incapable of taking effect (*d*). This proviso for *cesser*, as it is called, makes the term endure so long only as the purposes of the trust require; and, when these are satisfied, the term expires without any act to be done by the trustees: their title at once ceases, and they cannot, if they would, any longer intermeddle with the property.

Proviso for *cesser*.

But if a proviso for *cesser* of the term should not be inserted in the deed by which it is created, there is still a method of getting rid of the term, without disturbing the ownership of the lands which the term overrides.

(*d*) See Sugd. Vend. & Pur. 621, 14th ed.

Terms are used for securing portions.

Any estate of freehold is a larger estate than a term of years.

Merger of the term.

Surrender.

The lands in such cases, it should be observed, may not, and seldom do, belong to one owner for an estate in fee simple. The terms of which we are now speaking are most frequently created by marriage settlements, and are the means almost invariably used for securing the portions of the younger children ; whilst the lands are settled on the eldest son in tail. But, on the son's coming of age or on his marriage, the lands are, for the most part, as we have before seen (e), resettled on him for life only, with an estate tail in remainder to his unborn eldest son. The owner of the lands is therefore probably only a tenant for life, or perhaps a tenant in tail. But, whether the estate be a fee simple, or an estate tail, or for life only, each of these estates is, as we have seen, an estate of freehold (f), and, as such, is larger, in contemplation of law, than any term of years, however long. The consequence of this legal doctrine is, that if any of these estates should happen to be vested in any person, who at the same time is possessed of a term of years in the same land, and no other estate should intervene, the estate of freehold will infallibly swallow up the term, and yet be not a bit the larger. The term will, as it is said, be *merged* in the estate of freehold (g). Thus, let A. and B. be tenants for a term of 1,000 years, and subject to that term let C. be tenant for his life ; if now A. and B. should assign their term to C. (which assignment under such circumstances is called a *surrender*), C. will still be merely tenant for life as before. The term will be gone for ever ; yet C. will have no right to make any disposition to endure beyond his own life. He had the legal seisin of the lands before, though A. and B. had the possession by virtue of their term ; now, he will have both legal seisin and actual possession during his life, and A. and B. will have completely given up all their interest in the

(e) *Ante*, p. 95.
(f) *Ante*, p. 60.

(g) 8 *Prest. Conv.* 219. See *ante*, pp. 311, 340.

premises. Accordingly, if A. and B. should be trustees for the purposes we have mentioned, a surrender by them of their term to the legal owner of the land, will bring back the ownership to the same state as before. The Act to amend the law of real property (*l*) now provides that a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, shall be void at law unless made by deed. Surrenders now to be by deed.

The merger of a term of years is sometimes occasioned by the accidental union of the term and the immediate freehold in one and the same person. Thus, if the trustee of the term should purchase the freehold, or if it should be left to him by the will of the former owner, or descend to him as heir at law, in each of these cases the term will merge. So if one of two joint holders of a term obtain the immediate freehold, his moiety of the term will merge; or conversely if the sole owner of a term obtain the immediate freehold jointly with another, one moiety of the term will merge, and the joint ownership of the freehold will continue, subject only to the remaining moiety of the term (*i*). Merger being a *legal* incident of estates, formerly occurred quite irrespectively of the trusts on which they were held; but equity did its utmost to prevent any injury being sustained by a cestui que trust, the estate of whose trustee might accidentally have merged (*k*). But the Judicature Act of 1873 (*l*) provided that there should not, in future, be any merger by Accidental merger.

(*h*) Stat. 8 & 9 Vict. c. 106, s. 8, repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

(*i*) *Sir Ralph Bovey's case*, 1 Vent. 198, 195; Co. Litt. 186 a; Burton's Compendium, pl. 900.

(*k*) See 3 Prest. Conv. 320, 321;

Chambers v. Kingham, 10 Ch. D. 743.

(*l*) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 4. By stat. 37 & 38 Vict. c. 83, the former Act commenced on the 1st Nov. 1875.

Estates held
in autre droit.

operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. The law, though it did not recognize the trusts of equity, yet took notice in some few cases of property being held by one person in right of another, or *in autre droit*, as it is called; and in these cases the general rule was, that the union of the term with the immediate freehold would not cause any merger, if such union were occasioned by the act of law, and not by the act of the party. Thus, if a term were held by a person, to whose wife the immediate freehold afterwards came by descent or devise, such freehold, coming to the husband in right of his wife, would not have caused a merger of the term (*n*). So, if the owner of a term made the freeholder his executor, the term would not have merged (*n*); for the executor is recognized by the law as usually holding only for the benefit of creditors and legatees; but if the executor himself should be the legatee of the term, it seems that, after all the creditors have been paid, the term will still merge (*o*). And if an executor, whether legatee or not, holding a term as executor, should *purchase* the immediate freehold, the better opinion is, that this being his own act, will occasion the merger of the term, except so far as respects the rights of the creditors of the testator (*p*).

The term
might have
been kept on
foot.

There was formerly another method of disposing of a term when the purposes for which it was created had been accomplished. If it were not destroyed by a proviso for cesser, or by a merger in the freehold, it might have been kept on foot for the benefit of the

(*m*) *Doe d. Blight v. Pett*, 11 A. & E. 842; *Jones v. Davis*, 5 H. & N. 766; 7 H. & N. 507.

(*n*) Co. Litt. 338 b.

(*o*) 3 Prest. Conv. 310, 311. See *Law v. Urwin*, 16 Sim. 377,

and Lord St. Leonards' comments on this case, Sugd. V. & P. 507, 13th ed.

(*p*) Sugd. Vend. & Pur. 505, 13th ed.

owner of the property for the time being. A term, as we have seen, is an instrument of great power, yet easily managed ; and in case of the sale of the property, it might have been a great protection to the purchaser. Suppose, therefore, that, after the creation of such a term as we have spoken of, the whole property had been sold. The purchaser, in this case, often preferred having the term still kept on foot, and assigned by the trustees to a new trustee of his own choosing, in trust for himself, his heirs and assigns ; or, as it was technically said, *in trust to attend the inheritance*. The reason for this proceeding was that the former owner might, possibly, since the commencement of the term, have created some incumbrance upon the property, of which the purchaser was ignorant, and against which, if existing, he was of course desirous of being protected. Suppose, for instance, that a rent-charge had been granted to be issuing out of the lands, subsequently to the creation of the term : this rent-charge of course could not affect the term itself, but was binding only on the freehold, subject to the term. The purchaser, therefore, if he took no notice of the term, bought an estate, subject not only to the term, but also to the rent-charge. Of the existence of the term, however, we suppose him to have been aware. If now he should have procured the term to be surrendered to himself, the unknown rent-charge, not being any estate in the land, would not have prevented the union and merger of the term in the freehold. The term would consequently have been destroyed, and the purchaser would have been left without any protection against the rent-charge, of the existence of which he had no knowledge, nor any means of obtaining information. The rent-charge by this means became a charge, not only on the legal seisin, but also on the possession of the lands, and was said to be accelerated by the merger of the term (q). The

Assignment
in trust to
attend the
inheritance.

Case of a
rent-charge.

Consequence
of a surrender
of the term.

The term should have been assigned to attend the inheritance.

preferable method, therefore, always was to avoid any merger of the term ; but on the contrary, to obtain an assignment of it to a trustee in trust for the purchaser, his heirs and assigns, and to attend the inheritance. The trustee thus became possessed of the lands for the term of 1,000 years ; but he was bound, by virtue of the trust, to allow the purchaser to receive the rents, and exercise what acts of ownership he might please. If, however, any unknown incumbrance, such as the rent-charge in the case supposed, should have come to light, then was the time to bring the term into action. If the rent-charge should have been claimed, the trustee of the term would at once have interfered, and informed the claimant that, as his rent-charge was made subequently to the term, he must wait for it till the term was over, which was in effect a postponement *sine die*. In this manner, a term became a valuable protection to any person on whose behalf it was kept on foot, as well as a source of serious injury to any incumbrancer, such as the grantee of the rent-charge, who might have neglected to procure an assignment of it on his own behalf, or to obtain a declaration of trust in his favour from the legal owner of the term. For it will be observed that, if the grantee of the rent-charge had obtained from the persons in whom the term was vested a declaration of trust in his behalf, they would have been bound to retain the term, and could not lawfully have assigned it to a trustee for the purchaser.

If the purchaser had notice of the incumbrance at the time of his purchase, he could not use the term.

If the purchaser, at the time of his purchase, should have had notice of the rent-charge, and should yet have procured an assignment of the term to a trustee for his own benefit, the Court of Chancery would, on the first principles of equity, have prevented his trustee from making any use of the term to the detriment of the grantee of the rent-charge (r). Such a proceeding

(r) *Willoughby v. Willoughby*, 1 T. R. 768.

would evidently be a direct fraud, and not the protection of an innocent purchaser against an unknown incumbrance. To this rule, however, one exception was admitted, which reflects no great credit on the gallantry, to say the least, of those who presided in the Court of Chancery. In the common case of a sale of lands in fee simple from A. to B., it was holden that, if there existed a term in the lands, created prior to the time when A.'s seisin commenced, or prior to his marriage, an assignment of this term to a trustee for B. might be made use of for the purpose of defeating the claim of A.'s wife, after his decease, to her dower out of the premises (s). Here B. evidently had notice that A. was married, and he knew also that, by the law, the widow of A. would, on his decease, be entitled to dower out of the lands. Yet the Court of Chancery permitted him to procure an assignment of the term to a trustee for himself, and to tell the widow that, as her right to dower arose subsequently to the creation of the term, she must wait for her dower till the term was ended. We have already seen (t), that, as to all women married after the first of January, 1834, the right to dower has been placed at the disposal of their husbands. Such husbands, therefore, had no need to request the concurrence of their wives in a sale of their lands, or to resort to the devise of assigning a term, should this concurrence not have been obtained.

An exception.

Dower barred by assignment of term.

When a term had been assigned to attend the inheritance, the owner of such inheritance was not regarded, in consequence of the trust of the term in his favour, as having any interest of a personal nature, even in contemplation of equity; but as, at law, he had a real estate of inheritance in the lands, subject to the term, so, in equity, he had, by virtue of the trust

The owner of the inheritance subject to an attendant term had a real estate.

(s) Sugd. Vend. & Pur. 510, 13th ed.; Co. Litt. 208 a, n. (1). (t) *Ante*, p. 298.

Term attendant by construction of law.

of the term in his favour, a real estate of inheritance in immediate possession and enjoyment (*u*). If the term were neither surrendered nor assigned to a trustee to attend the inheritance, it still was considered attendant on the inheritance, by construction of law, for the benefit of all persons interested in the inheritance according to their respective titles and estates.

Act to render the assignment of satisfied terms unnecessary.

In 1845, however, an Act passed "to render the assignment of satisfied terms unnecessary" (*x*). This Act provides (*y*), that every satisfied term of years which, either by express declaration or by construction of law, shall upon the thirty-first day of December, 1845, be attendant upon the reversion or inheritance of any lands, shall *on that day absolutely cease* and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although thereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, 1845, and shall, for the purpose of such protection, *be considered in every Court of law and of equity to be a subsisting term*. The Act further provides (*z*) that every term of years then subsisting, or thereafter to be created, becoming satisfied after the thirty-first of December, 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any land, shall,

(*u*) Sugd. Vend. & Pur. 790, 11th ed.

(*x*) Stat. 8 & 9 Vict. c. 112.

(*y*) Sect. 1.

(*z*) Stat. 8 & 9 Vict. c. 112, s. 2; *Anderson v. Agnet*, L. R., 8 Ch. 180.

immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid (a). In the two first editions of this work, some remarks on this Act were inserted by way of Appendix. These remarks are now omitted, not because the author changed his opinion on the wording of the Act, but because the remarks, being of a controversial nature, seemed to him to be scarcely fitted to be continued in every edition of a work intended for the use of students, and also because the Act has, upon the whole, conferred a great benefit on the community. Experience has in fact shown that the cases in which purchasers enjoy their property without any molestation are infinitely more numerous than those in which they are compelled to rely on attendant terms for protection; so that the saving of expense to the generality of purchasers seems greatly to counterbalance the inconvenience to which the very small minority may be put, who have occasion to set up attendant terms as a defence against adverse proceedings. And it is very possible that some of the questions to which this Act gives rise may never be actually litigated in a Court of justice.

By the Conveyancing Act of 1881 (b), where land is held for an unexpired residue of not less than two hundred years of a term, which was originally of not less than three hundred years, without any trust or right of redemption in favour of the freeholder or reversioner, and without any rent, or with a rent which is of no money value or has been released or has ceased to be payable, then the term may be enlarged into a fee

Enlargement
of long term
into fee
simple.

(a) It has been decided that a term of years assigned to a trustee in trust for securing a mortgage debt, and subject thereto to attend the inheritance, is not an atten-

dant term within this Act. *Shaw v. Johnson*, 1 Dr. & Sm. 412.

(b) Stat. 44 & 45 Vict. c. 41, s. 65.

simple by a declaration to that effect, made by deed by any of the following persons (namely): (1) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term (c); (2) any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not; (3) any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not. The fee simple so acquired is in general subject to the same trusts, executory limitations over, rights and equities as the term; and includes the fee simple of all mines and minerals not severed in right or in fact at the time of the enlargement. Such a term as aforesaid may be so enlarged, although it have not the freehold as the immediate reversion thereon: but not if liable to be determined by re-entry for condition broken, or created by subdemise out of a term incapable of enlargement to fee-simple (d).

(c) In the case of a married woman, the concurrence of her husband is required, unless she be entitled for her separate use.
(d) Stat. 45 & 46 Vict. c. 39, s. 11.

CHAPTER II.

OF A MORTGAGE OF LAND.

WE have seen (*a*) that a mortgage forms part of the personal estate of the mortgagee. We will now consider the nature of the interests in land, which are created by a mortgage. At the present day what is generally understood by the term *mortgage* is a conveyance of land or other property as security for the payment of money. Mortgages are most frequently made to secure the repayment of money borrowed by the owner of the property mortgaged; in which case he incurs a debt, or personal obligation to repay out of whatever means he may possess (*b*): unless, indeed, it should have been agreed that he should not be under any personal liability of repayment (*c*). Such mortgages, however, usually include an express covenant for repayment. But in so far as a mortgage is a transfer of property, its object is to confer on the mortgagee a proprietary right, by exercising which he will be enabled to raise the money payable to him; so that he shall have the means of securing himself from loss in the event of his debtor being personally unable to pay, or of attaining the desired end, where there is no personal liability to payment. But though the object of a mortgage of land is nothing more than to pledge the land as security for a money payment, the form, which this transaction has usually assumed in modern English law, is such that

(*a*) *Ante*, p. 460.

(*b*) *Bac. Abr. Mortgage* (D); & *N. 762.*

(*c*) *Mathew v. Blackmore*, 1 H.

Yates v. Aston, 4 Q. B. 182.

the interests of the parties are of a very complicated nature. For, as we shall see, a mortgagee of land occupies one position *at law*, and another *in equity*.

Origin of term
mortgage.

The origin of the term *mortgage* appears in Glanville (*d*), in whose time either land or goods might be pledged as security for a debt. A pledge of land was effected by a conveyance thereof to the creditor to hold until the debt was paid, with an agreement either that the creditor should apply the rents and profits in reduction of the debt, or that he should receive them without any liability to account. In the latter case the transaction was called *mortuum vadium* (which in French is *mort gage*, whence mortgage); because, although the debtor might redeem the land on payment of the principal sum, in the meantime it was dead or unprofitable to him. The object of the *mortuum vadium* was to give the creditor the profits of the land in lieu of interest; the taking of which, under the name of usury, was anciently regarded as an unchristian abomination (*e*). But these ancient methods of pledging land seem to have fallen out of use at an early date, and to have been succeeded by a more stringent contract, under which the land was given in pledge until a certain day fixed for payment, with a stipulation that on failure to pay at the appointed time the land should remain to the creditor in fee (*f*). Thus Littleton (*g*) describes a mortgage as a feoffment *upon*

(*d*) Glanv. lib. x. c. 6—8.

(*e*) See Flouiden on Usury, Part I. Interest was first allowed by law by stat. 37 Hen. VIII. c. 9, by which also interest above ten per cent. was forbidden. By stat. 13 Anne, c. 15 (12 Anne, st. 2, c. 16, in Ruffhead), the legal rate of interest was reduced to five per cent., which remained the highest rate of interest that could be lawfully taken upon the mortgage of any lands, tenements or

hereditaments, or any estate or interest therein, until all the laws against usury were repealed in 1854. Any rate of interest to which the parties may agree may now be taken on a mortgage of lands. See stats. 5 & 6 Will. IV. c. 41; 2 & 3 Vict. c. 37; 18 & 14 Vict. c. 56; 17 & 18 Vict. c. 90.

(*f*) See Glan. x. 6, 7; Bract. 268 b; Madox, Form. Angl. Nos. 560—562, 569, 579, 589.

(*g*) Sects. 332 *et seq.*

condition that if the feoffor pay to the feoffee on a certain day a certain sum of money then the feoffor may re-enter. And he says that this is called a mortgage because, if the feoffor do not pay, then the land pledged is taken from him for ever and so dead to him. We have seen however that the term *mortgage* had been used earlier in a different sense. Still Littleton's derivation may help the reader to remember the nature of the transaction now called a mortgage *at law*. For what is now called a mortgage of land is the conveyance thereof from one to another for an estate in fee, or other estate, which is to be determined or re-conveyed on condition of the payment of money by the former on a certain day. And *at law*, if the condition be broken by non-payment of the money at the appointed time, the estate of the person, to whom the land was so conveyed, becomes absolute, or discharged from the condition. So that, at law, he will be entitled to hold the land, as his own, for all the estate limited to him. For in the Courts of Law the parties were held to the terms of their bargain, by which the land was to be redeemed on a certain day, or if not, to be forfeited by the debtor (*h*).

Construction
of a mortgage
at law.

This strict construction of a mortgage appears to have prevailed for a long time. But at length a mortgagee, who had failed to pay on the appointed day, obtained relief in the Court of Chancery against the forfeiture, which he had so incurred. It is not very clear when (*i*) or on what ground (*k*) this equitable

Relief given to
mortgagees in
equity.

(A) Bac. Abr. Mortgage (D); Y. B. 22 Hen. VI. 57, pl. 7; 7 Edw. IV. 3, 4, pl. 7, 10; Bro. Abr. Conditions, 203; Litt. ss. 382, 387.

(i) Suits for redeeming mortgages appear to have been brought in Queen Elizabeth's reign; 1 Cal. cxlv. 69, 71, 77, 79, 105, 111,

125, &c.; 2 Cal. 5, 14, 15, 27, 33, 35, &c.; and see *Langford v. Barnard* (37 Eliz.) and *Barnaby v. Greene* (9 Jac. I.) in Tothill, tit. Mortgage.

(k) It would appear from what is said by Sir G. Cary (Master in Chancery, 1599—1612) that relief was first given in cases of failure

jurisdiction was first exercised. But in the reign of Charles I. it was established as *equity* (*l*) that a mortgagor should be allowed to redeem his estate after the legal day of payment had gone by; and the Court of Chancery, on application by the mortgagor after the time fixed for redemption had elapsed, would decree that the mortgagee should, on repayment of all that was due to him, reconvey the estate to the mortgagor (*m*).

Principles of equity respecting mortgages.

Equity of redemption.

The main principles of equity in respect of the redemption of mortgages were settled in the reign of Charles II.; about the time when modern equity began to take shape as a system of rules resting upon principles evolved from precedent (*n*). The first principle established was that of the mortgagor's *equity of redemption*; that is, that the mortgagor, or any one standing in his place, shall be admitted in equity to redeem a mortgage after the day fixed by the contract for redemption is gone by, and the estate has become forfeited at law (*o*). It was further laid down as a general rule, subject to very few exceptions, that wherever a conveyance of an estate is originally intended as a security for money, whether this intention appear from the deed itself or by any other instrument or even by parol evidence (*p*), it is always considered in equity as a mortgage and redeemable; even though there is an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular

to pay at the appointed time by accident, or of some trifling default, and was afterwards extended to all cases of forfeiture of mortgaged land by failure to pay money when due; see Cary, 1.

(*l*) *Ante*, p. 158.

(*m*) *How v. Figures*, 1 Ch. Rep.

18; *Weldon v. Rallison*, *ib.* 91.

(*n*) *Ante*, p. 157.

(*o*) See *Tarn v. Turner*, 39 Ch. D. 456.

(*p*) *Prec. Ch.* 526; *England v. Codrington*, 1 Eden, 169; *Vernon v. Bethell*, 2 Eden, 110; 1 Coote on Mortgage, ch. iii. sect. 8.

description of persons (*q*). In other words, it was established that no agreement of the parties to a mortgage, that the mortgage should not be redeemable according to the rules of equity, should have any effect in equity (*r*). This principle is shortly summed up in the phrase "once a mortgage, always a mortgage" (*s*). Furthermore, it was held that, in equity, the right of the mortgagee was to the money secured, and he held the land only as security for his money; so that in equity he had a mere *charge* for the amount due to him, even though he were absolute tenant in fee at law. It was therefore decided that the benefit of a mortgage should go, along with the rest of the mortgagee's personal estate, to his executor or administrator, not his heir (*t*). And although at law the estate of a mortgagee in fee would go to his heir or devisee, yet in equity the heir or devisee was held a mere trustee thereof for the executor or administrator (*u*). Conversely, in equity the mortgagor was regarded as the owner of the mortgaged land, subject only to the mortgagee's charge; and the mortgagor's equity of redemption was treated as an equitable estate in the land, of the same nature as other equitable estates (*x*).

These principles of equity became so well settled and understood that no substantial change was made in the usual form of a mortgage. And at the present day,

Form of mortgage now usual.

(*q*) Co. Litt. 905 a, note (1); 1 Coote on Mortgage, ch. iii. sect. 2.

(*r*) *Pries v. Perrie*, 2 Freem. 253; *Salt v. Marquis of Northampton*, 1892, A. C. 1. Upon this principle it was held that any attempt to fetter the equity of redemption with any other condition than the payment of principal, interest and costs should be void; *Jennings v. Ward*, 2 Vern. 520; *James v. Kerr*, 40 Ch. D. 449, 459; *Field v. Hopkins*, 44 Ch. D. 524; *Re Wallis, Ex parte*

Lickorish, 25 Q. B. D. 176. As to the sums which the mortgagee may be allowed to charge for the use of his money since the repeal of the Usury Laws, see *Mainland v. Upjohn*, 41 Ch. D. 126.

(*s*) Lord Nottingham, C., *Newcourt v. Bonham*, 1 Vern. 7; *Howard v. Harris*, *ib.* 33.

(*t*) *Thornborough v. Baker*, 1 Ch. Ca. 288; 3 Swanst. 628.

(*u*) 2 Coote on Mortgage, ch. lxxix. sect. 1.

(*x*) *Casbourn v. Scarfe*, 1 Atk. 608, 606.

when the repayment of a loan of money is to be secured by a mortgage of land, the land is granted to the creditor in fee simple, with a proviso for reconveyance of the land to the debtor in fee on payment of the principal sum with interest at a specified rate on a certain day, usually six months after the date of the mortgage-deed. By the same deed the mortgagor generally enters into a personal covenant to pay principal and interest on the day appointed for reconveyance, and also to continue to pay interest at the same rate in case of failure to redeem at the appointed time. Until the six months are past the mortgagor has a *legal* right to redeem the land on the day named for repayment. But if he should allow that day to pass without payment or tender of the amount due, the mortgagee's estate will become absolute at law, and the mortgagor will have no right to the land save his equity of redemption. Mortgages, as is well known, are generally employed as permanent investments of money; and there is rarely any intention on either side that the loan shall be repaid in six months. Nevertheless, so well understood is the construction placed on a mortgage in equity, so firmly established is the mortgagor's right to redeem after the time fixed for payment is gone by, that mortgage deeds are always drawn in the form indicated. All that is expressed is an immediate conveyance of the land to the mortgagee and the agreement for reconveyance on payment six months after; and the real intention of the parties is left to be carried out by the operation of the rules of equity (y).

(y) The following duties are imposed by the Stamp Act, 1891, stat. 54 & 55 Vict. c. 89, replacing 83 & 84 Vict. c. 97, as amended by 51 Vict. c. 8, s. 15 and schedule:—

Mortgage, bond, debenture, covenant (except a marketable security otherwise specially charged with duty), and warrant of attorney to confess and enter up judgment:

- (1) Being the only or principal or primary security (other than an equitable mortgage) for the

Let us now consider the interests of the mortgagee and mortgagor in the mortgaged land during the continuance of the security. On execution of such a mortgage deed as has been described, the mortgagee acquires the fee simple and seisin of the land at law (2), and an immediate right of entry into actual possession (a). A mortgagor remaining in possession is at

The estate of the mortgagee.

payment or repayment of money not exceeding £				s.	d.
10l.	.....	.....	.....	0	0 3
Exceeding 10l.	and not exceeding 25l.	.....	.....	0	0 8
" 25l.	" 50l.	.....	.....	0	1 3
" 50l.	" 100l.	.....	.....	0	2 6
" 100l.	" 150l.	.....	.....	0	3 9
" 150l.	" 200l.	.....	.....	0	5 0
" 200l.	" 250l.	.....	.....	0	6 3
" 250l.	" 300l.	.....	.....	0	7 6

For every 100l. and also for any fractional part of 100l. of such amount 0 2 6

- (2) Being a collateral or auxiliary or additional or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped:

For every 100l. and also for any fractional part of 100l. of the amount secured 0 0 6

- (3) Being an equitable mortgage:

For every 100l. and any fractional part of 100l. of the amount secured 0 1 0

- (4) Transfer, assignment, disposition, or assignation of any mortgage, bond, debenture, covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:

For every 100l. and also for any fractional part of 100l. of the amount transferred, assigned or disposed, exclusive of interest which is not in arrear 0 0 6

And also where any further money is added to the money already secured { The same duty as a principal security for such further money.

- (5) Reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured:

For every 100l. and also for any fractional part of 100l. of the total amount or value of the money at any time secured 0 0 6

(2) *Ante*, pp. 192, 193.

(a) *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553; *Rogers v.*

Grasebrook, 2 Q. B. 895. If, however, the mortgage deed contain an express proviso (formerly com-

law in no better position than a tenant by sufferance (*b*). The mortgagee may therefore oust him at his pleasure, either by entry, or, if he will not go out peaceably, by action. And if the mortgagee chooses so to assert his legal rights, the mortgagor will have no right to resist him either at law (*c*) or in equity (*d*) without paying the amount due on the mortgage (*e*). For the Courts of Equity would never interfere to prevent a mortgagee from taking possession (*f*). But if he do take possession, he will become liable in equity to account very strictly, in case of subsequent redemption, for the rents and profits and for his management of the land (*g*); so strictly, indeed, that in practice a mortgagee avoids taking possession of the mortgaged land, save as a last resource. As we have seen (*h*), at law the estate of a mortgagee in fee passed on his death to his heir or devisee; though in equity the heir or devisee was a mere trustee for the mortgagee's executor or administrator, who became entitled to the money secured. But by the Conveyancing Act of 1881 (*i*), on the death after that year of a sole mortgagee of any freehold estate of inheritance, his estate, notwithstanding any testamentary disposition, devolves like a chattel real upon his personal representatives. So that all the rights and obligations,

mon, but now unusual), that the mortgagor shall remain in possession until the day fixed for payment, this will operate as a demise by the mortgagee to the mortgagor for the term indicated, and the latter will have a legal right to possession until the term has expired; see Davidson, *Prec. Conv.* Vol. II. Part II. pp. 43-45, 4th ed.; 1 Smith L. C. 553 *et seq.*, 9th ed.

(*b*) Notes to *Keech v. Hall*, 1 Smith L. C. 565-568, 9th ed.; *ante*, p. 482.

(*c*) *Doe d. Roby v. Maisey*, 8 B. & C. 767.

(*d*) 6 Q. B. 11, 359.

(*e*) By stat. 7 Geo. II. c. 20,

s. 1, provision was made for staying the proceedings in any action of ejectment brought by a mortgagee, on payment by the mortgagor, being the defendant in the action, of all principal, interest, and costs; *Doe d. Hurst v. Clifton*, 4 A. & E. 814. See also stat. 15 & 16 Vict. c. 76, ss. 219, 220, repealed (saving the jurisdiction thereby conferred) by 46 & 47 Vict. c. 49.

(*f*) 2 Mer. 359; 6 Pri. 503.

(*g*) 2 Seton on Decrees, 1076, 4th ed.

(*h*) *Ante*, p. 503.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 30; *ante*, pp. 219, 238.

legal as well as equitable, of a sole mortgagee of freeholds now pass on his death to his executor or administrator.

We have seen that, during the continuance of the security, the mortgagor's equity of redemption is in equity an estate in the mortgaged land (*k*). A mortgagor's estate has generally the same incidents as any other equitable estate: but being subject to the mortgagee's charge it is of course not so beneficial as the estate of one, for whom land is held on a simple trust (*l*). Thus we have seen that a mortgagor's possession is not protected, even in equity, against the will of the mortgagee (*m*). But if the mortgagor be allowed to remain in possession, he may take the profits for his own use without liability to account for them to the mortgagee (*n*). So he retains generally the right of free enjoyment incident to his equitable ownership (*o*): nor will he be restrained from waste (*p*), at the mortgagee's instance, unless the latter show that the acts contemplated would impair the value of the security offered to him (*q*), or amount to wanton destruction (*r*). An equity of redemption is alienable at the mortgagor's pleasure or for his debts in the same way as any other equitable estate, which is not a simple trust estate (*s*). And the estate of a mortgagor in fee is real estate in equity and will pass as such to a devisee under his will (*t*), or will descend to his heir, if he should die intestate. Formerly, on the death of a mortgagor of land, the mortgage debt was primarily payable, like all other debts, out of his personal estate; so that his

k) *Ante*, p. 503.

l) *Ante*, p. 170.

m) *Ante*, p. 506.

n) 2 Coote on Mortgage, ch. lxv. sect. 2; 2 Seton on Decrees, 1075, 4th ed.

o) *Ante*, p. 175.

p) *Ante*, p. 109.

q) *King v. Smith*, 2 Hare, 239, 244.

r) *Goodman v. Kine*, 8 Beav. 379.

s) *Ante*, pp. 176—178, 264—267; Lewin on Trusts, 797, 800 *et seq.*, 818, 827—829, 8th ed.

t) 3 Atk. 805.

The estate
of the mort-
gagor.

heir or devisee was entitled, as a rule, to have the land exonerated from the mortgage at the expense of the mortgagor's general personal estate (*u*). But this rule was reversed by an Act of 1854, commonly called Locke King's Act, and the Acts amending it (*x*). And now, under these Acts, a mortgagor's heir or devisee succeeding to his estate in the mortgaged land is not entitled to have the mortgage debt discharged out of the mortgagor's personal or other real estate; but the land so charged, as between the different persons claiming under the deceased person, is primarily liable to the payment of all mortgage debts with which the same is charged: unless the mortgagor shall by will, deed or other document have signified a contrary or other intention (*y*). So that now, as a rule, a mortgagor's heir or devisee must take the land subject to the mortgage (*z*). The rule established by these Acts does not affect the right of the mortgagee to obtain full payment of the mortgage debt out of the personal estate of the mortgagor or otherwise (*a*).

Mortgagor's
power of
leasing.

As the mortgagor's equity of redemption is an *estate*

(*u*) 2 Jarm. Wills, 681 *et seq.*, 4th ed.; Williams on Real Assets, 27.

(*x*) Stats. 17 & 18 Vict. c. 118; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.

(*y*) Stat. 17 & 18 Vict. c. 118. And a general direction, that the debts or all the debts of a testator shall be paid out of his personal estate, is not to be deemed to be a declaration of an intention contrary to or other than the rule established by Locke King's Act, unless such contrary or other intention be further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate; stat. 30 & 31 Vict. c. 69, s. 1. Nor is such

contrary intention to be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal or residuary real estate; stat. 40 & 41 Vict. c. 34; see *Re Flock*, 87 Ch. D. 677.

(*z*) By stat. 40 & 41 Vict. c. 34, the rule of Locke King's Act is extended to the case of a mortgage or any other equitable charge (including any lien for unpaid purchase-money) on any land or other hereditaments, of whatever tenure, belonging to a testator or an intestate; unless, in the case of a testator, he shall within the meaning of the Acts have signified a contrary intention. See *Re Cockcroft*, 24 Ch. D. 94, 100; *Re Kerahan*, 87 Ch. D. 674.

(*a*) Stat. 17 & 18 Vict. c. 118.

in the contemplation of equity only, it does not enable him to create any *legal* estate or interest in the mortgaged land; not even a lease for any term however short (*b*). In some cases, however, there was inserted in the mortgage deed, by agreement between the parties, a power for the mortgagor to grant leases; and such a power operated under the Statute of Uses in the same manner as a power of leasing given to a tenant for life by a settlement (*c*). But under the Conveyancing Act of 1881, if the mortgage be made after the year 1881, the mortgagor while in possession has power by virtue of that Act to make an agricultural or occupation lease for any term not exceeding twenty-one years, or a building lease for any term not exceeding ninety-nine years upon the conditions defined in the Act (*d*). And any such lease made in compliance with these conditions will be valid as against the mortgagee (*e*). When a mortgagor exercises this statutory power of leasing, the lessee obtains a term in the land valid at law in the same manner as the lessee of an equitable tenant for life obtains a legal term on an exercise of the power of leasing given by the Settled Land Act, 1882 (*f*). But this statutory right of the mortgagor may be excluded or restricted by agreement between the parties expressed in the mortgage deed or otherwise in writing (*g*); and in practice a stipulation

(*b*) *Doe* d. *Lord Downe* v. *Thompson*, 9 Q. B. 1037; *Lowe* v. *Telford*, 1 App. Cas. 414. A lease made by a mortgagor, otherwise than under an express or a statutory power, is void as against the mortgagee; and as against the mortgagor himself, his successors in estate and the lessee, it can only take effect legally by estoppel. See *ante*, p. 468; *Keech* v. *Hall*, 1 Doug. 31; 1 Smith L. C. 546, 9th ed.; *Alchorne* v. *Gomme*, 2 Bing. 54; *Webb* v. *Austin*, 7 Man. & Gr. 701; *Cuthbertson* v. *Irving*, 6 H. & N. 135.

But a lessee from the mortgagor may redeem the mortgage, and so prevent his ejectment by the mortgagee; *Tarn* v. *Turner*, 39 Ch. D. 458.

(*c*) *Ante*, p. 360; Davidson, *Prec. Conv.* Vol. II. Pt. II. 332, 335, n., 4th ed.

(*d*) Stat. 44 & 45 Vict. c. 41, s. 18.

(*e*) *Metropolitan, &c., Building Society* v. *Smith*, 22 Q. B. D. 70.

(*f*) *Ante*, p. 372.

(*g*) Stat. 44 & 45 Vict. c. 41, s. 18, sub-s. 13.

is very often made that a mortgagor shall not exercise his statutory power of leasing, or that he shall not exercise it without the consent of the mortgagee. It is important for a mortgagee clearly to negative the mortgagor's right to lease, should he wish to do so; for a contract to make or accept a lease under the statute may be enforced by or against every person on whom the lease would, if granted, be binding (*h*). And the provisions of the Act are to be construed to apply, as far as circumstances admit, to any letting, and to any agreement, whether in writing or not, for leasing or letting (*i*). But, if desired, express powers of leasing may still be given by the mortgage deed as before; and what is more, the mortgagor's statutory powers of leasing may be enlarged by the mortgage deed to any extent agreed on (*k*). A mortgagor's statutory powers of leasing may be applied to mortgages made before the year 1882, by agreement in writing between mortgagor and mortgagee made after 1881: but so nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement (*l*).

Actions by
mortgagor.

A further consequence of the transfer of the legal estate to the mortgagee upon the occasion of a mortgage was that the mortgagor was unable to bring in his own name any action at law to recover possession of the land (*m*). But by the Judicature Act of 1873 (*n*), a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for

(*h*) Sect. 18, sub-s. 12.

(*i*) Sect. 18, sub-s. 17.

(*k*) Sect. 18, sub-s. 14.

(*l*) Sect. 18, sub-s. 16.

(*m*) *Doe d. Marriott v. Edwards*,
5 B. & Ad. 1065.

(*n*) Stat. 36 & 37 Vict. c. 66,
s. 25, sub-s. 5.

such possession, or for the recovery of such rents and profits or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

Let us now consider what remedies the mortgagee has for obtaining the repayment of his loan. And first, at any time after the day fixed for repayment in the deed, he may call in his money, and in the event of non-payment may sue the mortgagor personally on the covenant contained in the mortgage deed. Secondly, he may *foreclose* the mortgage. For although the Courts of Equity allowed the mortgagor an equity of redemption after the day fixed for payment, they would not permit him to continue to hold the mortgaged land for an indefinite time after the mortgagee had applied to them to enforce repayment (*o*). To obtain foreclosure, it will be necessary for the mortgagee to take proceedings (*p*) against the mortgagor in the Chancery Division of the High Court (*q*), claiming that an account may be taken of the principal and interest due to him, and that the mortgagor may be directed to pay the same, with costs, by a day to be appointed by the Court, and that in default thereof he may be foreclosed his equity of redemption (*r*). A day is then fixed by the Court for payment; which day, however, may, on the application of the mortgagor, good reason being shown (*s*), be postponed for a time.

Mortgagee's remedies.

Foreclosure.

(*o*) 2 Coote on Mortgage, Ch. lxxviii.

(*p*) Formerly by suit or action, now by originating summons; Rules of the Supreme Court, Dec. 1885, No. 21 (Order L.V. r. 5 a); W. N. 2 Jan. 1886.

(*q*) The County Courts have the jurisdiction of the High Court as to the foreclosure or redemption

or enforcement of any mortgage, charge or lien for not more than 500*l.*; stat. 51 & 52 Vict. c. 43, s. 67.

(*r*) 2 Seton on Decrees, 1085, 4th ed.

(*s*) *Nanny v. Edwards*, 4 Russ. 124; *Eyre v. Hanson*, 2 Beav. 478.

Or, if the mortgagor should be ready to make repayment, before the cause is brought to a hearing, he may do so at any time previously, on making proper application to the Court, admitting the title of the mortgagee to the money and interest (*t*). If, however, on the day ultimately fixed by the Court, the money should not be forthcoming, an order will be made that the debtor do thenceforth stand absolutely foreclosed from all equity of redemption in the mortgaged premises (*u*). Such an order is considered to vest in the mortgagee for the first time the full beneficial title to the mortgaged land (*x*); which he will thereafter be entitled to keep and deal with as his own. The Court may now order a sale of the mortgaged property in foreclosure proceedings, instead of foreclosure (*y*). Thirdly, the mortgagee may take possession, as we have seen (*z*); though at the risk of incurring the equitable liabilities of a mortgagee in possession. A mortgagee may pursue all these remedies at once (*a*).

Fourthly, a mortgagee may sell under his power of sale, if he have one. For in addition to the remedy by foreclosure, which, it will be perceived, involves the necessity of an application to the Court, it has long been usual to provide a more simple and less expensive remedy in mortgage transactions; this is nothing more than a power given by the mortgage deed to the mortgagee, without further authority, to sell the premises, in case default should be made in payment. When such a power is exercised, the mortgagee, having the

Power of
sale.

(*t*) Stat. 7 Geo. II, c. 20, s. 2.

(*u*) 2 Seton on Decrees, 1089, 4th ed. But even a final order for foreclosure is not absolutely conclusive, and there are circumstances under which a mortgagor may be allowed to redeem after such an order; see *Campbell v. Hotyland*, 7 Ch. D. 166.

(*x*) *Heath v. Pugh*, 6 Q. B. D.

345; 7 App. Cas. 235.

(*y*) Stat. 44 & 45 Vict. c. 41, s. 25; see Williams's Conveyancing Statutes, 162 *et seq.*

(*z*) *Ante*, p. 506.

(*a*) 2 Coote on Mortgage, Ch. lxiii. sect. 3; *Lockhart v. Hardy*, 9 Beav. 349; *Farrer v. Lacy, Hartland & Co.*, 31 Ch. D. 42.

whole estate in fee simple at law, is of course able to convey the same estate to the purchaser, and, as this remedy would be ineffectual, if the concurrence of the mortgagor were necessary, it was decided that his concurrence cannot be required by the purchaser (b). The mortgagee, therefore, is at any time able to sell; but, having sold, he has no further right to the money produced by the sale than he had to the lands before they were sold. He is at liberty to retain to himself his principal, interest and costs; and, having done this, the surplus, if any, must be paid over to the mortgagor. By the Act commonly called "Lord Cranworth's Act" (bb), a power of sale was rendered incident to every mortgage or charge made by deed executed after the passing of the Act on any hereditaments of any tenure, unless a contrary intention were declared by the deed. But it was nevertheless usual to insert an express power of sale in mortgage deeds, until this provision of Lord Cranworth's Act was repealed by the Conveyancing Act, 1881 (c). By the latter Act (cc), a mortgagee of any property, under a mortgage made *by deed* after the year 1881, has a power of sale, when the mortgage money has become due, to the same extent as if the power had been expressly conferred by the mortgage deed. But a mortgagee shall not exercise this statutory power of sale unless and until (i) notice requiring payment of the mortgage-money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or (ii) some interest under the mortgage is in

The mortgagor's concurrence cannot be required

Statutory powers of sale.

(b) *Corder v. Morgan*, 18 Ves. 844; *Clay v. Sharpe*, Sugd. Vend. & Pur. Appendix, No. XIII. p. 1096, 11th ed.
(bb) Stat. 23 & 24 Vict. c. 145 (passed 28th Aug. 1860), part 2; see also sects. 82, 84. See Wil-

liams's Conveyancing Statutes, 187—140.

(c) Stat. 44 & 45 Vict. c. 41, s. 71; see Williams's Conveyancing Statutes, 187—141, 251—253.

(cc) Sect. 19.

arrear and unpaid for two months after becoming due; or (iii) there has been a breach of some provision contained in the mortgage deed or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon (*d*). Power is expressly given by the Act to a mortgagee exercising his statutory power of sale to convey the property sold by deed for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority (*dd*). The proper application of the purchase-money by the mortgagee is also provided for (*e*). Where a conveyance is made in *professed* exercise of the power of sale conferred by the Act, the title of the purchaser is not to be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power, is to have his remedy in damages against the person exercising the power (*f*). All these statutory provisions respecting a mortgagee's power of sale may be varied or extended or entirely excluded by the terms of the mortgage deed (*g*). But it is now usual in practice to rely upon the statutory power of sale instead of inserting express powers for the same purpose in mortgage deeds (*h*).

(*d*) Stat. 44 & 45 Vict. c. 41, ss. 20, 24; see Williams's Conveyancing Statutes, 144, 145, 160.

(*dd*) Sect. 21, sub-sect. 1; see Williams's Conveyancing Statutes, 145—147. This does not enable an equitable mortgagee by deed to convey the legal estate; *Re Hodson and Howe's Contract*, 85 Ch. D. 668.

(*e*) Sect. 21, sub-sect. 8; see

Williams's Conveyancing Statutes, 149.

(*f*) Sect. 21, sub-sect. 2; see Williams's Conveyancing Statutes, 147—149.

(*g*) Sect. 19, sub-sects. 2, 3.

(*h*) As to the question of the expediency of relying on statutory powers, see Williams's Conveyancing Statutes, 141—144, 252, 253.

The same Conveyancing Act contains provisions enabling a mortgagee under a mortgage made by deed after 1881, in the absence of stipulation to the contrary, to appoint a receiver of the income of mortgaged property, but not before his statutory power of sale shall become exerciseable (i); also to insure against fire, under certain conditions, and to cut and sell timber, while in possession (k). A mortgagee in possession under a mortgage made after 1881 is also empowered by the same Act, in the absence of stipulation to the contrary, to grant the same leases as a mortgagor in possession is thereby empowered to grant; and leases so granted will be good against all prior incumbrancers and the mortgagor (l). But, except under the statutory or an express power of leasing, a mortgagee of land is unable, before foreclosure, to make a lease, which will be unconditionally binding on the mortgagor (m).

Mortgagee's power to appoint receiver, cut timber and grant leases.

If the mortgagor wish to pay off the mortgage after the day fixed for payment is past, he must, as a rule, give to the mortgagee six calendar months' previous notice in writing of his intention to do so, and must punctually pay or tender the money at the expiration of the notice (n). For if the money should not be then ready to be paid, the mortgagee will be entitled to fresh notice; as it is considered reasonable that he should have time afforded him to look out for another

Mortgagor's remedies.

(i) Stat. 44 & 45 Vict. c. 41, ss. 19, 24. The object of the appointment of a receiver is to ensure payment of the interest out of the income of the mortgaged property, without taking possession. The receiver is bound to apply the income (after keeping down outgoings) in payment of the interest, but to pay the surplus to the mortgagor.

(k) Sects. 19, 23; see Williams's Conveyancing Statutes, 137, 139—141, 153—160.

(l) Sect. 18, sub-s. 2; ante,

p. 509.

(m) *Hungerford v. Clay*, 9 Mod. 1; *Franklin v. Ball*, 33 Beav. 560, 563; Davidson, *Prec. Conv.*, Vol. II. Pt. II. 385, 387, 4th ed.

(n) *Shrapnell v. Blake*, 2 Eq. Ca. Abr. 603, pl. 84; *Smith v. Smith*, 1891, 3 Ch. 550. But this rule does not apply where the just inference from the transaction is that the mortgage is merely temporary, as in the case of a mortgage to bankers by deposit of title deeds; *Fitzgerald's Trustees v. Mellersh*, 1892, 1 Ch. 385.

Re-convey-
ance.

investment. A mortgagor is, however, entitled, if he think fit, to pay the mortgagee six months' interest in advance, in lieu of notice (*o*). When the mortgagor has duly paid or tendered the money due from him, either after proper notice or with due interest in advance instead, he will be entitled to require the mortgagee to execute at his expense a reconveyance of the legal estate in the mortgaged land (*p*). And to enforce this right, or otherwise duly to enforce his equity of redemption, he may take proceedings (*q*) for redemption in the Chancery Division (*r*) against the mortgagee (*s*). An order for sale may now be made in redemption as well as in foreclosure proceedings (*t*).

Lapse of
time may
bar right to
redeem.

A mortgagor may, however, lose his equity of redemption by lapse of time. For under the present Statute of Limitations (*u*), whenever a mortgagee has obtained possession of the land comprised in his mortgage, the mortgagor cannot bring an action to redeem the mortgage but within twelve (*x*) years next after the time when the mortgagee obtained possession, or next after any written acknowledgment of the title of the mortgagor, or of his right to redemption, shall have been given to him or his agent, signed by the mortgagee (*y*). And when the period limited by the Act is

(*o*) *Johnson v. Evans*, W. N. 1889, p. 95.

(*p*) See *ante*, p. 505, n., as to the stamp on a reconveyance.

(*q*) Formerly by suit or action, now by originating summons; Rules of the Supreme Court, Dec. 1885, No. 21 (Order LV. r. 5 a); W. N. 2 Jan. 1886.

(*r*) Or in the County Court, if the amount be not more than 500*l.*; see *ante*, p. 511, n. (*q*).

(*s*) 2 Seton on Decrees, 1040, 4th ed.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 25; see Williams's Conveyancing Statutes, 162 *et seq.* In redemption as well as in foreclo-

sure proceedings a mortgagee is entitled to be paid his costs and expenses; and will not be disallowed his costs without positive misconduct on his part; see 2 Seton on Decrees, 1057 *et seq.*, 2nd ed.; *National Provincial Bank of England v. Games*, 81 Ch. D. 582.

(*u*) Stat. 37 & 38 Vict. c. 57, s. 7.

(*x*) Formerly twenty; by stat. 3 & 4 Will. IV. c. 27, s. 28, and the previous rule of equity; 2 Coote on Mortgage, ch. lxxiv. sect. 1.

(*y*) See *Hyde v. Dallaway*, 2 Hare, 528; *Truelock v. Robey*, 12

determined, the mortgagor's title to the land is extinguished (z). So that when a mortgagee has been in possession for twelve years without giving the required acknowledgment, he becomes absolutely entitled to the land. The time so limited for the mortgagor to redeem is not extended in the case of his being under any disability, such as lunacy (a). In the same way a mortgagee's rights may be barred by lapse of time, if he allow the mortgagor to remain in possession without paying principal or interest and without acknowledgment of his title; in which case he will be barred from taking possession twelve years after his right of entry accrued (b), and will be barred from taking foreclosure proceedings or suing for the money secured by a mortgage of land twelve years after his right of action accrued. But if the mortgagee obtain from the mortgagor any payment of principal or interest, or any written and signed acknowledgment of his title or right, he will not be barred from any of his remedies until twelve years after the last of such payments or acknowledgments (c). And if the mortgagee, being out of possession, take foreclosure proceedings within due time, he will not be barred from taking or suing for possession, till twelve years from the date of the order for final foreclosure, which first gave him the full

Mortgagee's
rights barred
by lapse of
time.

Sim. 402, *Lucas v. Dennison*, 18 Sim. 584; *Stanfield v. Hobson*, 16 Beav. 286.

(z) Stats. 8 & 4 Will. IV. c. 27, s. 34; 37 & 38 Vict. c. 57, s. 9.

(a) *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, *ib.* 182. This is different from the rule of equity in force before 1833; see 2 Coote on Mortgage, ch. lxxiv. sect. 1.

(b) *Ante*, p. 505.

(c) Stats. 8 & 4 Will. IV. c. 27, ss. 2, 14; 1 Vict. c. 28, 37 & 38 Vict. c. 57, ss. 8, 9; *Wrixon v. Fiss*, 8 Dru. & War. 104, 119;

Harlock v. Ashberry, 19 Ch. D. 539; *Hugill v. Wilkinson*, 88 Ch. D. 480. But if the mortgagee, or the person standing in his place, should be under any of the disabilities mentioned in the Statute of Limitations when the right to sue for foreclosure or possession first accrued, it appears that proceedings may be taken within the further time now allowed in case of disability; see stats. 8 & 4 Will. IV. c. 27, ss. 16—18; 37 & 38 Vict. c. 57, ss. 3—5; and see next chapter.

beneficial title to the land (*d*). The mortgagee's title to the land is extinguished when his remedies are barred (*e*).

Mortgages
for long terms
of years.

Mortgages of freehold lands are sometimes made for long terms, such as 1,000 years. But this is not now often the case, as the fee simple is more valuable and therefore preferred as a security. Mortgages for long terms, when they occur, are usually made by trustees, in whom the terms have been vested in trust to raise, by mortgage, money for the portions of the younger children of a family, or other similar purposes. The reasons for vesting such terms in trustees for these purposes were explained in the last chapter (*f*).

Mortgage of
copyholds.

Copyhold, as well as freehold, lands may be the subjects of mortgage. The purchase of copyholds, it will be remembered, is effected by a surrender of the lands from the vendor into the hands of the lord of the manor, to the use of the purchaser, followed by the admittance of the latter as tenant to the lord (*g*). The mortgage of copyholds is effected by surrender, in a similar manner, from the mortgagor to the use of the mortgagee and his heirs, subject to a condition, that on payment by the mortgagor to the mortgagee of the money lent, together with interest, on a given day, the surrender shall be void. If the money should be duly paid on the day fixed, the surrender will be void accordingly, and the mortgagor will continue entitled to his old estate; but if the money should not be duly paid on that day, the mortgagee will then acquire at law an absolute right to be admitted to the customary estate

(*d*) *Heath v. Pugh*, 6 Q. B. D. 345; 7 App. Cas. 235; *ante*, p. 512
 (*e*) Stats. 3 & 4 Will. IV. c. 27, s. 84; 37 & 38 Vict. c. 57, s. 9.
 (*f*) See *ante*, p. 488.
 (*g*) *Ante*, pp. 447, 449.

which was surrendered to him ; subject nevertheless to the equitable right of the mortgagor, confining the actual benefit derived by the former to his principal money, interest and costs. The mortgagee, however, is seldom admitted, unless he should wish to enforce his security, contenting himself with the right to admittance conferred upon him by the surrender ; and, if the money should be paid off, all that will then be necessary will be to procure the steward to insert on the Court rolls a memorandum of acknowledgment, by the mortgagee, of satisfaction of the principal money and interest secured by the surrender (*h*). If the mortgagee should have been admitted tenant, he must, of course, on repayment, surrender to the use of the mortgagor, who will then be re-admitted. The provisions of the Conveyancing Act of 1881, by which estates of inheritance vested in a sole mortgagee devolve on his personal representatives (*i*), originally applied to copyholds as well as freeholds (*k*). But by the Copyhold Act, 1887 (*l*), these provisions shall not apply to land of copyhold or customary tenure *vested in the tenant on the Court rolls* of any manor by way of mortgage. When a mortgagee of copyholds of inheritance has been admitted tenant, his estate will therefore pass to his heir or devisee : but if he has not been admitted, it appears that his estate will devolve on his executors or administrators. The conditional surrender of copyholds by way of mortgage is usually preceded by a deed of covenant to surrender executed by the mortgagor, in which the power of sale was formerly inserted (*m*). The statutory power of sale (*n*) may now be incorporated in such a deed.

(*h*) 1 Scriv. Cop. 242 ; 1 Watk. Cop. 117, 118.

(*i*) *Ante*, p. 508.

(*k*) *Re Hughes*, W. N. 1884, p. 53.

(*l*) Stat. 50 & 51 Vict. c. 73, s. 45 ; see *Re Mills*, 40 Ch. D. 14.

(*m*) Davidson, Prec. Conv. Vol. II. Part II. pp. 113, 405, 4th ed.

(*n*) *Ante*, p. 513.

Mortgage of
leaseholds.

Leasehold estates may be mortgaged by assignment of the term to the mortgagee, subject to a proviso for re-assignment on payment of the money advanced on a given day. But in such a case, as the mortgagee is assignee of the term, he becomes liable to the landlord for payment of the rent and performance of the covenants of the lease (*o*). It is therefore usual, when the rent and covenants are onerous, to mortgage leaseholds by demise or underlease of the premises for a term less by a day or two than the term granted by the lease, with a proviso for surrender of the term granted by the mortgage on payment of the amount lent with interest on the day appointed. In such cases the mortgagee does not become the landlord's tenant, and is not liable on the covenants in the lease (*p*): but his security is, of course, only the term created by the underlease by way of mortgage. A declaration is however often inserted in such mortgages that the mortgagor shall hold his reversion in the original term on trust for the mortgagee, subject to redemption. The statutory powers of sale and leasing will now be incorporated in a deed of mortgage of leaseholds, whether by assignment or demise, in the absence of provision to the contrary (*q*).

Equitable
mortgages.

Besides the mortgages already described, which give the mortgagee a *legal* proprietary right in the lands pledged to him, there are equitable mortgages (*r*), by which lands are charged in *equity* only. Equitable charges arise upon the mortgage of an equity of redemption (*s*) or other equitable estate, or when the legal owner of lands pledges them by a signed writing without deed (*t*), or by deposit of the title deeds with the mortgagee. For, notwithstanding the stringent

Deposit of
title deeds.

(*o*) *Ante*, p. 471.

(*p*) *Ante*, p. 481.

(*q*) *Ante*, pp. 509, 518.

(*r*) See *ante*, p. 505, n., as to
the stamp duty on equitable mort-

gages.

(*s*) See *ante*, pp. 508, 507.

(*t*) See *ante*, pp. 188, 177, 199,
464, 465, 477.

provision of the Statute of Frauds to the contrary (*u*), it was held by the Court of Chancery that such a deposit, even without any writing, operated as an equitable mortgage of the estate of the mortgagor in the lands comprised in the deeds (*x*). This doctrine still remains; and the same doctrine applies to copies of Court roll relating to copyhold lands (*y*), for such copies are the title deeds of copyholders.

Another instance of an equitable charge is a vendor's **Vendor's lien.** lien. For when lands are sold, but the whole of the purchase-money is not paid, the vendor has a lien in equity on the lands for the amount unpaid, together with interest at four per cent., the usual rate allowed in equity (*z*). And the circumstance of the vendor having taken from the purchaser a bond or a note for the payment of the money will not destroy the lien (*a*). But if the vendor take a mortgage of part of the estate, or any other independent security, his lien will be gone. If the sale be made in consideration of an annuity, it appears that a lien will subsist for such annuity (*b*), **Sale for annuity.** unless a contrary intention be inferred from the nature of the transaction (*c*).

A curious illustration of the anxiety of the Court of Chancery to prevent any imposition being practised by the mortgagee upon the mortgagor occurs in the following doctrine: that, if money be lent at a given **A stipulation to raise the interest on failure of punctual payment is void.**

(*u*) 29 Car. II. c. 3, ss. 1, 3; ante, p. 148.

(*z*) *Russell v. Russell*, 1 Bro. C. C. 269. See *Ex parte Haigh*, 11 Ves. 403. There must be an actual deposit; *Re Beatham, Ex parte Broderick*, 18 Q. B. D. 380; 8 Times L. R. 489.

(*y*) *Whitbread v. Jordan*, 1 You. & Coll. 308; *Lewis v. John*, 1 C. P. Coop. 8. See, however, *Sugd. Vend. & Pur.* 630, 13th ed.; *Jones v. Smith*, 1 Hare, 56; 1 Phill. 244.

(*z*) *Chapman v. Tanner*, 1 Vern. 267; *Pollexfen v. Moore*, 3 Atk. 272; *Mackreth v. Symmons*, 15 Ves. 828; *Sugd. Vend. & Pur.* 670, 14th ed.

(*a*) *Grant v. Mills*, 2 V. & B. 306; *Winter v. Lord Hanson*, 8 Russ. 488.

(*b*) *Matthew v. Bowler*, 6 Hare, 110.

(*c*) *Buckland v. Pocknell*, 13 Sim. 496; *Dixon v. Gayfer*, 21 Beav. 118; 1 De G. & J. 655.

But a stipulation to diminish the interest on punctual payment is good.

rate of interest, with a stipulation that, on failure of punctual payment, such rate shall be increased, this stipulation is held to be void as too great a hardship on the mortgagor; whereas the very same effect may be effectually accomplished by other words. If the stipulation be, that the higher rate shall be paid, but on punctual payment a lower rate of interest shall be accepted, such a stipulation, being for the benefit of the mortgagor, is valid, and will be allowed to be enforced (*d*).

Mortgages to trustees.

The loan of money on mortgage is an investment frequently resorted to by trustees, when authorized by their trust to make such use of the money committed to their care: in such a case, the fact that they are trustees, and the nature of their trust, are usually omitted in the mortgage deed, in order that the title of the mortgagor or his representatives may not be affected by the trusts. It is, however, a rule of equity, that when money is advanced by more persons than one, it shall be deemed, unless the contrary be expressed, to have been lent in equal shares by each (*e*); if this were the case, the executor or administrator of any one of the parties would, on his decease, be entitled to receive his share (*f*). In order, therefore, to prevent the application of this rule, it was usual to declare, in all mortgages made to trustees, that the money was advanced by them on a joint account, and that, in case of the decease of any of them in the lifetime of the others, the receipts of the survivors or survivor should be an effectual discharge for the whole of the money. And now by the Conveyancing Act of 1881 (*g*)

Joint account clause.

(*d*) *Strode v. Parker*, 2 Vern. 816; 8 Burr. 1374; 1 Fonb. Eq. 398. See *Union Bank of London v. Ingram*, 16 Ch. D. 63.

(*e*) 3 Atk. 734; 2 Ves. sen. 258; 3 Ves. jun. 631.

(*f*) *Petty v. Styward*, 1 Cha.

Rep. 57; 1 Eq. Ca. Ab. 290; *Vickers v. Cowell*, 1 Beav. 529.

(*g*) Stat. 44 & 45 Vict. c. 41, s. 61; as to the effect of which, see *Williams's Conveyancing Statutes*, 238—240, 498.

provisions having the effect of the joint account clause previously usual are incorporated, in the absence of stipulation to the contrary, in every mortgage, obligation for payment of money, and transfer of mortgage or obligation made after the year 1881, in which the money secured is expressed to be advanced by or owing to more persons than one out of or as money belonging to them on a joint account, or which is made to more persons than one jointly, and not in shares.

As the interest even of an equitable mortgagee is an interest in land, it was held, under the Act extending creditors' remedies (*h*), that judgment debts against a mortgagee were a charge upon his interest in the mortgaged lands (*i*). But it was afterwards provided (*k*), that where any mortgage should have been paid off prior to, or at the time of, the conveyance of the lands to a purchaser or mortgagee for valuable consideration, the lands should be discharged both from the judgment and Crown debts of the mortgagee. And by a later statute, to which we have already referred (*l*), the lien of all judgments, of a date later than the 28th of July, 1864, was abolished.

Judgment debts a charge on mortgagee's interest in the lands.

New enactment.

Mortgages are frequently transferred from one person to another. The mortgagee may wish to be paid off, and another person may be willing to advance the same or a further amount on the same security. In such a case the mortgage debt and interest are assigned by the old to the new mortgagee; and the lands which form the security are conveyed, or if leasehold assigned, by the old to the new mortgagee, subject to the equity of redemption which may be subsisting in the premises;

Transfer of mortgages.

(*h*) Stat. 1 & 2 Vict. c. 110, s. 13; *ante*, pp. 246, 266.

(*i*) *Russell v. M' Culloch*, 1 Kay & J. 813.

(*k*) Stat. 18 & 19 Vict. c. 15,

s. 11; *Greaves v. Wilson*, 25 Beav. 484.

(*l*) Stat. 27 & 28 Vict. c. 112, *ante*, pp. 248—250.

that is, subject to the right in equity of the mortgagor or his representatives to redeem the premises on payment of the principal sum secured by the mortgage, with all interest and costs (*m*).

Mortgagee may be compelled to transfer.

Under the Conveyancing Act of 1831 (*n*), a mortgagor entitled to redeem now has power to require a mortgagee, who is not and has not been in possession, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person; and the mortgagee will then be bound to assign and convey accordingly.

Mortgage of equity of redemption.

As we have seen (*o*), the equity of redemption belonging to the mortgagor may again be mortgaged by him; this may be either to the former mortgagee by way of further charge, or to some other person. In order to prevent frauds by clandestine mortgages, it is provided by an Act of William and Mary (*p*), that a person twice mortgaging the same lands, without discovering the former mortgage to the second mortgagee, shall lose his equity of redemption. Unfortunately, however, in such cases the equity of redemption, after payment of both mortgages, is generally worth nothing. And if the mortgagor should again mortgage the lands to a third person, the Act will not deprive such third mortgagee of his right to redeem the two former mortgages (*q*). When lands are mortgaged, as occasionally happens, to several persons, each ignorant of the security granted to the other, questions generally arise as to the priority of the various charges. Such cases frequently illustrate the advantage of a *legal* proprietary right, which

(*m*) As to the stamp on a transfer, see *ante*, p. 505; *Wale v. Commissioners of Inland Revenue*, 4 Ex. D. 270.

(*n*) Stat. 44 & 45 Vict. c. 41, s. 15, amended by stat. 45 & 46 Vict. c. 39, s. 12; see Williams's

Conveyancing Statutes, 119—124.

(*o*) *Ante*, p. 520.

(*p*) Stat. 4 & 5 Will & Mary, c. 16, s. 3; see *Kennard v. Fulvove*, 2 Gif. 81.

(*q*) Stat. 4 & 5 Will & Mary, c. 16, s. 4.

avails against all the world, over an *equitable* right, which avails not against purchasers for value without notice (*r*). Thus the claim of a mortgagee, who has obtained the legal estate, will take precedence over any previous equitable charge, of which he had no notice, as well as over subsequent charges; and nothing short of connivance in fraud will deprive him of this advantage (*s*). So if a mortgagee having the legal estate make a further advance without notice of an intermediate mortgage, he has a first charge on the lands for the whole amount of his advances, which must be satisfied before the second mortgagee can receive anything thereout (*t*). And if a third or sub-Tacking. sequent mortgagee, who had no notice, when he took his security (*u*), of any but a first mortgage, can procure a transfer to himself of the first mortgagee's legal estate, he may *tack*, as it is said, his own mortgage to the first, and so postpone any intermediate incumbrancer (*x*). But no claim of a mortgagee, who has secured the legal estate, will be preferred to a prior equitable charge, of which he had notice, when he advanced his money (*y*). As between themselves, equitable charges rank, as a rule, in the order in which they were created (*z*): though one equitable mortgagee may be postponed to another, whose charge was subsequent to his own, on grounds of fraud or even of negligence (*a*).

(*r*) See *ante*, pp. 2, 3, 61, 170, 171, 501, 505.

(*s*) See *Hewitt v. Loosemore*, 9 Hare, 449; *Northern Counties of England Fire Insurance Co. v. Whipp*, 28 Ch. D. 482.

(*t*) *Goddard v. Complin*, 1 Ch. Ca. 119; *Lloyd v. Attwood*, 3 De G. & J. 614, 658, 657.

(*u*) Subsequent notice is immaterial.

(*x*) *Marsh v. Lee*, 2 Vent. 337; *Brace v. Duchess of Marlborough*, 2 P. W. 491; *Bates v. Johnson*, Job. 804; *Taylor v. Russell*, 1891, 1 Ch. 8, affirmed, 8 Times L. R.

463. An attempt was made to abolish tacking by stat. 37 & 38 Vict. c. 78, s. 7, repealed by 38 & 39 Vict. c. 87, s. 129.

(*y*) *Le Neve v. Le Neve*, Amb. 436, 446; *Birch v. Ellames*, 2 Anst. 427.

(*z*) *Jones v. Jones*, 8 Sim. 688; *Wilmot v. Pitts*, 5 Hare, 14.

(*a*) See *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1; *Union Bank of London v. Kent*, 39 Ch. D. 238; *Farrand v. Yorkshires Banking Co.*, 40 Ch. D. 182.

Mortgages
of land in
Middlesex
and York-
shire.

Mortgages or charges made by any deed or writing on land in Middlesex, Yorkshire or Kingston-upon-Hull, ought to be registered in the proper county register as well as purchase deeds (*b*). Under the Middlesex Registry Act, if more mortgages than one be made of the same piece of land, they have priority according to the date of registration (*c*); with this exception, that the claim of a mortgagee, who has obtained the legal estate without notice of any previous equitable charge and has duly registered his mortgage, will be preferred to the claims of those who may previously have obtained and registered merely equitable charges (*d*). But a mortgagee may be deprived of the priority given by this Act in consequence of the operation of the rule of equity already mentioned (*e*), which prevents a mortgagee, who has had clear previous notice of a prior unregistered charge, from gaining any priority of interest, with regard to the equitable estate in the land, by priority of registration (*f*). The registration of a conveyance of land in Middlesex is not equivalent to notice of the conveyance (*g*); so that the operation of *tacking* may be successfully performed by a third mortgagee of such land, if he have no notice of the second mortgage, notwithstanding that the second mortgage may have been registered (*h*). The provisions of the Middlesex Registry Act do not apply in the case of a mortgage of land in Middlesex made by deposit of title deeds *without* any written memorandum (*i*), or

(*b*) See *ante*, pp. 196, 197.

(*c*) See *Neve v. Pennell*, 2 H. & M. 170.

(*d*) *Morecock v. Dickins*, Amb. 678.

(*e*) *Ante*, p. 197.

(*f*) See *Kolland v. Hart*, L. R., 6 Ch. 878; *Bradley v. Riches*, 9 Ch. D. 189.

(*g*) *Morecock v. Dickins*, Amb. 678; *Malins, V.-C., Re Russell Road Purchase Money*, L. R., 12

Eq. 78, 83. But if a man searches the register, he will have notice of registered conveyances. See *Procter v. Cooper*, 1 Jur., N.S. 149.

(*h*) *Bedford v. Bacchus*, 2 Eq. Ca. Abr. 615, Case 12; *Cator v. Cooley*, 1 Cox, 182.

(*i*) *Sumpter v. Cooper*, 2 B. & Ad. 223; *Wood, V.-C., Neve v. Pennell*, 2 H. & M. 187; C. A., *Kettlewell v. Watson*, 26 Ch. D.

of a vendor's lien for unpaid purchase-money (*k*). In all these respects the law was formerly the same for land in Yorkshire as for land in Middlesex (*l*). But now, as we have seen (*m*), all assurances registered under the Yorkshire Registries Act, 1884 (*n*), shall have priority according to the date of registration, and no person shall lose any priority given by this Act merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud. And it is enacted (*o*) that in any case in which priority or protection might, but for this Act, have been given or allowed to any estate or interest in lands by reason or on the ground of such estate or interest being protected by or tacked to any legal or other estate or interest in such lands, no such priority or protection shall, after the commencement of this Act (*p*), be so given or allowed to any estate or interest in lands within the three ridings, except as against any estate or interest, which shall have existed prior to such commencement, and full effect shall be given in every Court to this present provision, although the party claiming such priority or protection as aforesaid, shall claim as a purchaser for valuable consideration, and without notice. Where any lien or charge on any lands within any of the three ridings is claimed in respect of any unpaid purchase-money or by reason of any deposit of title deeds, a memorandum of such lien or charge may be

507. If the deposit of deeds be accompanied by any written document, charging the land, the Act applies, and the document ought to be registered; *Neve v. Pennell*, 2 H. & M. 170.

(*k*) See C. A., *Kettlewell v. Watson*, 28 Ch. D. 501, 507.

(*l*) *Wrightson v. Hudson*, 2 Eq. 'a. Abr. 609, Case 7; *Re Wight's Mortgage Trust*, L. R., 16 Eq. 41; *Credland v. Potter*, L. R., 10 Ch. 8; *Kettlewell v. Watson*, 28 Ch. D. 501, 507.

(*m*) *Ante*, p. 197.

(*n*) Stat. 47 & 48 Vict. c. 54, s. 12. Sect. 15 of this Act provided that the registration of any instrument under this Act should be deemed to constitute actual notice thereof, but was repealed by stat. 48 & 49 Vict. c. 26, s. 6.

(*o*) Stat. 47 & 48 Vict. c. 54, s. 16.

(*p*) The Act came into operation on the 1st January, 1885. See sect. 2.

registered under this Act. And no such lien or charge will have any effect or priority against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum thereof has been registered in accordance with the provisions of the Act (q).

Mortgage for
future debts.

Future
advances.

A mortgage may be made for securing the payment of money which may thereafter become due from the mortgagor to the mortgagee (r). Where a mortgage extends to future advances, it has been decided, that the mortgagee cannot safely make such advances, if he have notice of an intervening second mortgage (s).

Effect of two
mortgages by
the same
person.

There is one case in which the rules of equity singularly, and, as the late author thought, unduly favoured the mortgagee. If one person should have mortgaged lands to another for a sum of money, and subsequently have mortgaged other lands to the same person for another sum of money, the mortgagee was placed by the rules of equity in the same favourable position as if the whole of the lands had been mortgaged to him for the sum total of the money advanced. The mortgagor could not redeem either mortgage, after it had become absolute at law (t), without also redeeming the other: and the mortgagee might enforce the payment of the whole of the principal and interest due to him on both mortgages out of the lands comprised in either (u). This rule, known as the doctrine of consolidation of securities, was extended to the case of mortgages

Consolidation
of securities.

(q) Sect. 7.

(r) As to the stamp duty on such a mortgage, see stat. 54 & 55 Vict. c. 39, s. 88, replacing 33 & 34 Vict. c. 97, s. 107.

(s) *Roll v. Hopkinson*, 9 H. L. C. 514; *London and County Banking Co. v. Ratcliffe*, 6 App. Cas. 722. See also *Menzies v. Lightfoot*, L. R. 11 Eq., 59.

(t) *Cummins v. Fletcher*, 14 Ch. D. 699. The right of a mortgagee to consolidate does not arise until the interest of the mortgagor has become an *equity of redemption*; 14 Ch. D. 708, 709, 712, 713, 715; see *ante*, pp. 502, 504.

(u) *Pope v. Onslow*, 2 Vern. 286; *Jones v. Smith*, 2 Ves. jun. 372, 376.

of different lands made to different persons by the same mortgagor becoming vested by transfer in the same mortgagee. In such a case, it was held that the mortgagee, who had taken a transfer of the different mortgages, might consolidate all his securities as against the original mortgagor (*x*). But it was decided that a mortgagee could not consolidate his securities as against an assignee of the equity of redemption, unless he should have acquired a right of consolidation previously to the assignment of the equity of redemption (*y*). The right of consolidation arose at the time when two or more mortgages made by the same mortgagor, or any of his predecessors in title, became vested in the same mortgagee and absolute at law (*z*).

The right of a mortgagee to consolidate his securities is now partially abolished by the Conveyancing Act of 1881 (*a*), which enacts that a mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. But this provision applies only if and as far as a contrary intention is not expressed in the mortgage deeds, or *one of them*; and only where the mortgages, or one of them, are or is made after the year 1881. The rules of equity as to consolidation of securities thus appear still to remain in force in all cases in which the mortgages sought to be consolidated by a mortgagee were made before the year 1882, or in

(*x*) *Salby v. Pomfret*, 1 J. & H. 336; 3 De G., F. & J. 595; *Harter v. Colman*, 19 Ch. D. 630, 689.

(*y*) *White v. Hillacre*, 3 Y. & C. Ex. 597, 608, 609; *Jennings v. Jordan*, 6 App. Cas. 698; *Harter v. Colman*, 19 Ch. D. 630;

see *Vint v. Pudget*, 2 De G. & J. 611.

(*z*) *Cummins v. Fletcher*, 14 Ch. D. 699.

(*a*) Stat. 44 & 45 Vict. c. 41, s. 17; see Williams's Conveyancing Statutes, 125—128.

which one of the mortgages, though made after 1881, was created by a deed expressing an intention to exclude the application of the above enactment (c). A declaration of such an intention is not unfrequently inserted in mortgage deeds. It follows, therefore, that no person can safely lend money on a second mortgage. For, in addition to the risks of some third mortgagee getting in and *tacking* the first mortgage (d), there is this further danger, that the first mortgagee may have previously acquired a right to consolidate with his security some other mortgage, by which property of the same mortgagor has been charged for more than its value, and may, by exercising this right, exclude the second mortgage (e). The purchaser of an equity of redemption is exposed to similar risks. Hence, it follows, that, in the words of an eminent judge, "It is a very dangerous thing at any time to buy equities of redemption, or to deal with them at all" (f).

(c) *Griffith v. Pound*, 45 Ch. D. 558.

(d) *Ante*, p. 525.

(e) See Williams's Conveyanc-

ing Statutes, 126—128.

(f) *Wood, V.-C., Bonsor v. Luck*, L. R., 4 Eq. 587, 549.

PART V.

OF TITLE.

To have a good title to land is to have the essential part of ownership, namely, the right to maintain or recover possession of the land as against all others (a). In English law, all title to land is founded on possession (b). Thus a person, who is in possession of land, although wrongfully, has a title to the land, which is good against all except those, who can show a better title; that is, can prove that they or their predecessors had earlier possession, of which they were wrongfully deprived (c). For possession of land is *prima facie* evidence of a seisin *in fee* (d); and he, who sues for the recovery of land, of which another is in possession, must recover on the strength of his own title, and cannot found his claim on the weakness of the possessor's title (e). And not only does possession of land give a good title as against all but rightful owners (whose claim, as we have seen, is founded on prior *possession*),

(a) *An's*, pp. 2, 61, 425, 469.

(b) By the common law, every one, who brought a real or mixed action (*aris*, pp. 23, 24), must have founded his claim on the previous possession of himself or his ancestor; Bract. fo. 284 a, 435 b; Litt. s. 170, 3 Black. Comm. 180, 195; Holmes on the Common Law, pp. 244—246.

(c) Bract. fo. 80 b, 31 a, 52 a, 434 b, 435 a; *Doe d. Hughes v. Dyball*, Moo. & Malk. 348; *Doe d. Smith and Payne v. Webber*, 1

A. & E. 119; *Asher v. Whitlock*, L. R., 1 Q. B. 1.

(d) *Doe d. Graham v. Penfold*, 8 C. & P. 538; Cole on Ejectment, 211. And an estate by wrong especially is always an estate in fee simple; Williams on Seisin, 7, 8; *Leach v. Jay*, 9 Ch. D. 44.

(e) *Roe d. Baldane v. Harvey*, 4 Burr. 2484, 2487; Cole on Ejectment, 287; *Danford v. McAnulty*, 8 App. Cas. 456, 462; Rules of the Supreme Court, 1883, Order XXI. r. 21.

but it also continually tends to bar the rights of all, who have such prior title (*f*). For if those, who are rightfully entitled to land, take no steps to assert their rights within the period prescribed by statute, their remedies will be barred and their title extinguished (*g*). So that possession of land for the prescribed period (*h*) will give a good title thereto, as against all the world.

The limitation of actions for the recovery of land is now regulated by a statute passed in 1833 as amended by an Act of 1874 (*i*), which, however, did not come into operation until the 1st of January, 1879. Under these statutes, no person shall make an entry or bring an action (*k*) to recover any land but within twelve (*l*) years next after the right to do so first accrued to him, or to some person through whom he claims (*m*). But when a written acknowledgment of the title of the person entitled to any land has been given to him or his agent, signed by the person in possession, the time for recovery of the land is extended to twelve years from such acknowledgment (*n*). If, however, when the right of entry or action first accrued, the person entitled was under the disability of infancy, coverture (if a woman), or unsoundness of mind, then the land may be recovered within six (*o*) years next after such person

Disabilities.

(*f*) *Leach v. Jay*, 9 Ch. D. 44.

(*g*) Stat. 3 & 4 Will. IV. c. 27, s. 84.

(*h*) See *Trustess, Executors and Agency Co. v. Short*, 18 App. Cas. 793.

(*i*) Stats. 3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57. As to the limitation of the old real and mixed actions, which were abolished by the former statute, and the acquisition of title by long continued possession under the old law, see notes to *Nepean v. Doe*, 2 Smith L. C.; 3 Black. Comm. 189, 196; Bac. Abr. Limitation

of Actions; Co. Litt. 114 b, 115 a; Litt. s. 170; Bract. fo. 31 a, 51 b, 487 b; Glanv. III. 2, XIII. 32.

(*k*) See *ante*, p. 61.

(*l*) Formerly twenty; stat. 3 & 4 Will. IV. c. 27, s. 2.

(*m*) Stat. 37 & 38 Vict. c. 57, s. 1. See *Nepean v. Doe*, 2 M. & W. 394.

(*n*) Stats. 3 & 4 Will. IV. c. 27, s. 14; 37 & 38 Vict. c. 57, s. 2. See *Doe d. Curson v. Edmonds*, 6 M. & W. 295; *Sanders v. Sanders*, 19 Ch. D. 378.

(*o*) Formerly ten; stat. 3 & 4 Will. IV. c. 27, s. 16, which also in-

ceased to be under such disability or died, notwithstanding that the time otherwise limited for action may have expired (*p*): but the land cannot be recovered, even in case of disability, after the expiration of thirty years (*q*) from the time when the right first accrued (*r*). No extension of time is allowed for the disability of any person, other than the person to whom the right of entry or action first accrued (*s*). The right to recover land in respect of an estate in remainder or reversion or other future estate is deemed to have first accrued at the time when the same became an estate in possession: but if the person last entitled to any particular estate, on which any future estate was expectant, was not in possession of the land when his interest determined, a person becoming entitled in possession to a future estate can only recover the land within twelve years after the right of entry or action first accrued to such particular tenant or within six years after such future estate became vested in possession, whichever period shall be the longer. And if the right of the particular tenant shall have been barred by the statute, no one can recover the land in respect of any subsequent estate created by any instrument executed or taking effect after the right of entry or action first accrued to such particular tenant (*t*). A person entitled to an estate to take effect after or in defeasance of an estate tail will also be barred from recovering the land, if the tenant in tail execute an assurance insufficient to bar the remainders, &c., expectant thereon (*u*), and any person continue in possession of the land by virtue of such assurance for twelve years after the time when

Estates in remainder or reversion.

After an estate tail.

cluded absence beyond seas in the list of disabilities. This was removed therefrom by stat. 37 & 38 Vict. c. 57, s. 4.

(*p*) Stat. 37 & 38 Vict. c. 57, s. 3; *Borrow v. Ellison*, L. R., 6 Ex. 128.

(*q*) Formerly forty; stat. 3 & 4

Will. IV. c. 27, s. 17.

(*r*) Stat. 37 & 38 Vict. c. 57, s. 5.

(*s*) Stat. 3 & 4 Will. IV. c. 27, s. 18.

(*t*) Stat. 37 & 38 Vict. c. 57, s. 2.

(*u*) See *ante*, p. 98.

As to equitable estates.

the tenant in tail, or his successor, might, without the consent of any other person, have executed a complete disentailing assurance (x). Persons entitled in equity to any estate in land must, as a rule, assert their rights within the same period as if they had been entitled to the like estate at law (y). But when any land shall have been vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to take action to recover the land shall be deemed to have first accrued at and not before the time at which the land shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him (z). And the Statute of Limitations does not bar the claim of a *cestui que trust* against his trustee to recover any property held on an express trust, or the proceeds thereof retained by the trustee or previously received by him and converted to his own use, or for any fraud or fraudulent breach of trust to which the trustee was party or privy (a). In every case of a concealed fraud, the right of any person to sue in equity for the recovery of any land, of which he or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered: but this shall not enable any owner of lands to sue in equity for the recovery thereof, or for setting aside any conveyance thereof on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has

Concealed fraud.

(x) Stat. 37 & 38 Vict. c. 57, Q. B. D. 128.

s. 6.

(y) Stat. 3 & 4 Will IV. c. 27, (a) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 2; 51 & 52 Vict. c. 59, s. 8; Lewin on Trusts, ch. xxx, sects. 1, 2, pp. 863 & seq., 900, 8th ed.

s. 24.

(z) Stat. 3 & 4 Will. IV. c. 27,

s. 25. See Lewin on Trusts, 876, 8th ed.; *Patrick v Simpson*, 24

not assisted in the commission of such fraud, and who at the time he made the purchase did not know and had no reason to believe that any such fraud had been committed (b). And nothing in the Statute of Limitations shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to sue may not be barred by virtue of that statute (c). The manner in which the rights of a mortgagor and mortgagee of land are affected by the Statutes of Limitation has been already noticed (d). The right to rents, whether rents service, rents seck or Rents. rents charge (e), and also the right to tithes when in Tithes. the hands of laymen (f), is subject to the same period of limitation as the right to land (g). The time for Advowson. bringing an action to enforce the right of presentation to a benefice is limited to three successive incumbencies, all adverse to the right of presentation claimed, or to the period of sixty years, if the three incumbencies do not together amount to that time (h); but whatever the length of the incumbencies, no such action can be brought after the expiration of 100 years from the time at which adverse possession of the

(b) Stat. 3 & 4 Will. IV. c. 27, s. 26; *Sturgis v. Morse*, 24 Beav. 541; affirmed 3 De Gex & Jo. 1; *Chatham v. Hoare*, L. R., 9 Eq. 571; *Vane v. Vane*, L. R., 8 Ch. 383; *Lawrance v. Lord Norreys*, 15 App. Cas. 210.

(c) Stat. 3 & 4 Will. IV. c. 27, s. 27.

(d) *Ante*, p. 516.

(e) See *Grant v. Ellis*, 9 M. & W. 113, deciding that the Statute of Limitations does not operate to bar the landlord's right to recover rent reserved on a lease for years; *De Beauvoir v. Owen*, 5 Ex. 166; *Archbold v. Scully*, 9 H. L. O. 360, 375; *Payne v. Esdaile*, 13 App. Cas. 613.

(f) Stat. 3 & 4 Will. IV. c. 27, s. 1; see *Dean of Ely v. Bliss*, 2

De G. M. & G. 459, deciding that this Act applies only as between rival claimants to tithes, and not as between the tithe-owner and the owner of the land subject to tithe. As to the time required to support a claim of *modus decimandi*, or exemption from or discharge of tithes, see stat. 2 & 3 Will. IV. c. 100, amended by 4 & 5 Will. IV. c. 88; *Salkeld v. Johnson*, 1 Mac. & G. 242. The circumstances under which lands may be tithe free are well explained in Burton's Compendium, ch. 6, sect. 4.

(g) See the enactments cited above with regard to the recovery of land.

(h) Stat. 3 & 4 Will. IV. c. 27, s. 30.

Money
charged on
land.

Crown
rights.

Prescription.

benefice shall have been obtained (i). And in every case where the period limited by the Act is determined, the right and title of the person who might have taken proceedings for the recovery of the land, rent or advowson in question within the period, is extinguished (j). Money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, can only be recovered within twelve (k) years next after a present right to receive the same accrued to some person capable of giving a discharge therefor, or from the last payment of principal or interest on account thereof, or the last written and signed acknowledgment of the right thereto (l). And no proceedings can be taken to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any such sum of money or legacy, or any damages in respect of such arrears, except within the time, within which the same would be recoverable if there were not any such trust (m). The Crown is not bound by the Statutes of Limitation of 1833 and 1874 (n): but by an Act of George III. (o) the rights of the Crown in all lands and hereditaments are barred after the lapse of sixty years.

The title to purely incorporeal hereditaments, whether appendant, appurtenant or in gross, depends upon grant or upon prescription from immemorial user, by which a

(i) Sect. 38.

(j) Stat. 3 & 4 Will. IV. c. 27, s. 34; *Scott v. Mason*, 3 Dru. & War. 388; *Sands v. Thompson*, 22 Ch. D. 614.

(k) Former twenty; stat. 3 & 4 Will. IV. c. 27, s. 40.

(l) Stat. 37 & 38 Vict. c. 57, s. 8; *Sutton v. Sutton*, 22 Ch. D. 511; *Fearnside v. Flint*, *ib.* 579.

(m) Stat. 37 & 38 Vict. c. 57,

s. 10.

(n) See Shelford's Real Property Statutes, 140, 141, 8th ed.; Bac. Abr. Prerogative (E. 5, 7).

(o) Stat. 9 Geo. III. c. 16, amended by 24 & 25 Vict. c. 62, and extended to the Duke of Cornwall by 23 & 24 Vict. c. 53, and 24 & 25 Vict. c. 62, s. 2, and extended to Ireland by 39 & 40 Vict. c. 37.

grant is implied. The time of legal memory was long since fixed at the beginning of the reign of King Richard I., by analogy to the time which, by a statute of Edward I. (*p*), was fixed for the limitation of the old writ of right (*q*). And in the absence of an express grant, a man might either prescribe that he and his ancestors had from time immemorial exercised a certain right in gross (*r*), or that he, being seised in fee of certain lands, and all those whose estate he had, had from time immemorial exercised as appendant or appurtenant to their own lands certain rights, such as rights of common or way, over certain other lands (*s*). In both of these cases proof of a user as of right, for twenty years or upwards, was formerly considered to afford a presumption of immemorial enjoyment (*t*). But this presumption might be effectually rebutted by proof that the enjoyment had in fact commenced within the time of legal memory (*u*); in which case the enjoyment for centuries would go for nothing. This is still the law with regard to prescriptions of the former kind, namely, prescriptions of immemorial user by a man and his ancestors (*x*). But with regard to prescriptions of the latter kind, where the owner of one tenement, sometimes called the dominant tenement, claims to exercise some right over another tenement, called the servient tenement, he may either still prove his rights as before (*y*), or he may have recourse to an Act of William IV. (*z*), called the Prescription Act, which has materially shortened the proof required, in all cases where a recent uninterrupted user as of right can be

The Prescrip-
tion Act.

(*p*) Stat. of Westminster the First, 3 Edw. I. c. 39.

(*q*) Litt. sect. 170; 2 Inst. 238; 2 Bl. Com. 81. See *ante*, p. 89.

(*r*) *Welcome v. Upton*, 6 Mee. & Wels. 536; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

(*s*) *Gateward's case*, 6 Rep. 59b.

(*t*) *Rex v. Jolyffe*, 2 Barn. &

Cress. 64.

(*u*) See *Jenkins v. Harvey*, 1 Cro., Mee. & Rosc. 894, 895.

(*x*) *Shuttleworth v. Le Fleming*, *ubi supra*.

(*y*) *Warrick v. Queen's College, Oxford*, L. R., 6 Ch. 716, 723; *Aynsley v. Glover*, L. R., 10 Ch. 283.

(*z*) Stat. 2 & 3 Will. IV. c. 71.

Rights of
common, &c.

Rights of
way, &c.

Light

Disabilities,
&c.

shown. By this Act no right of common or other profit or benefit, called in law-French *profit à prendre*, to be taken and enjoyed from or upon land (except tithes, rent and services), shall, if actually taken and enjoyed by any person claiming right thereto without interruption for thirty years, be defeated by showing only that it was first enjoyed prior thereto; and if enjoyed for sixty years the right is made absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (a). For rights of way and other easements, watercourses and the use of water, the terms are twenty and forty years respectively instead of thirty and sixty years (b). And when the access and use of light for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (c). The periods mentioned are periods next before some action or suit in which the claim is brought in question; and no act is deemed an interruption unless submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof and of the person making or authorizing the same to be made (d). The time during which any person, otherwise capable of resisting any claim, shall be an infant, idiot, *non compos mentis*, *feme covert* or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party

(a) Sect. 1.
(b) Sect. 2.
(c) Sect. 3.

(d) Sect. 4; *Bennison v. Cartwright*, 5 Best & Smith, 1

thereto, is excluded from the above periods, except when the claim is declared absolute and indefeasible (e); provided that in the case of ways and watercourses where the servient tenement shall be held for term of life or years exceeding three years, the time of enjoyment of the way or watercourse during such term is excluded from the computation of the period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof (f). The Crown is expressly bound by the provisions of the Prescription Act respecting *profits à prendre*, ways and water rights: but is not bound by those respecting light (g). The rights above mentioned may be lost by abandonment, of which non-user for twenty years or upwards is generally sufficient evidence, although a shorter period will suffice if an intent to abandon appear (h). Rights over Crown lands.
Abandonment.

Although the possession of land is attended with the advantages before described (i), yet mere possession is of course not conclusive evidence of a title good against all the world. Some further proof or guarantee of title is required on a transfer of real property, unless the transferee is to take, without compensation, the risk of being ejected by some person, who has a better title. In ancient times, as we have seen, conveyances of land were principally made from a superior to an inferior, as from the great baron to his retainer, or from a father to his daughter on her marriage (k). The grantee became

(e) Sect. 7.

(f) Sect. 8. See *Symonds v. Leaker*, 15 Q. B. D. 629.

(g) *Perry v. Evans*, 1891, 1 Ch. 658.

(h) *Moore v. Rawson*, 8 Barn. & Cres. 332, 339; *The Queen v. Chorley*, 12 Q. B. 515, 519; *Crossley v. Lightowler*, L. R., 8

Eq. 279; 2 Ch. 478. For further information as to the law of prescriptive rights, the reader is referred to the author's *Lectures on Rights of Common and other Prescriptive Rights*, now published.

(i) *Ante*, p. 531.

(k) See *ante*, p. 64.

Warranty.

Warranty
implied by
word *give*.

Express
warranty.

the tenant of the grantor ; and if any consideration were given for the grant, it more frequently assumed the form of services or annual rent, than the immediate payment of a large sum of money (*l*). Under these circumstances, it may readily be supposed, that, if the grantor were ready to warrant the grantee quiet possession, the title of the former to make the grant would not be very strictly investigated ; and this appears to have been the practice in ancient times ; every charter or deed of feoffment usually ending with a clause of warranty, by which the feoffor agreed that he and his heirs would warrant, acquit, and for ever defend the feoffee and his heirs against all persons (*m*). Even if this warranty were not expressly inserted, still it would seem that the word *give* used in a feoffment, had the effect of an implied warranty ; but the force of such implied warranty was confined to the feoffor only, exclusive of his heirs, whenever a feoffment was made of lands to be holden of the chief lord of the fee (*n*). Under an express warranty, the feoffor, and also his heirs, were bound, not only to give up all claim to the lands themselves, but also to give to the feoffee or his heirs other lands of the same value, in case of the eviction of the feoffee or his heirs by any person having a prior title (*o*) ; and this warranty was binding on the heir of the feoffor, whether he derived any lands by descent from the feoffor or not (*p*), except only in the case of the warranty commencing, as it was said, by disseisin ; that is, in the case of the feoffor making a feoffment with warranty of lands of which he, by that very act (*q*), disseised some

(*l*) *Ante*, pp. 14, 44, 47, 65.

(*m*) Bract. fo. 17 a. As we have seen, the obligation of warranty originally formed part of the relation between feudal lord and tenant ; and this obligation, in the days of subinfeudation, was a potent factor in the acquisition by a tenant in fee of the right

to alien as against his heir ; *ante*, pp. 37, 64.

(*n*) 4 Edw. I. stat. 3, c. 6 ; 2 Inst. 275 ; Co. Litt. 384 a, n. (1).

(*o*) Co. Litt. 365 a.

(*p*) Litt. s. 712.

(*q*) Litt. s. 704 ; Co. Litt. 371 a.

person (*r*), in which case it was too palpable a hardship to make the heir answerable for the misdeed of his ancestor. But, even with this exception, the right to bind the heir by warranty was found to confer on the ancestor too great a power; thus, a husband, whilst tenant by the curtesy of his deceased wife's lands, could, by making a feoffment of such lands with warranty, deprive his son of the inheritance; for the eldest son of the marriage would usually be heir both to his mother and to his father; as heir to his mother he would be entitled to her lands, but as heir of his father he was bound by his warranty. This particular case was the first in which a restraint was applied by Parliament to the effect of a warranty, it having been enacted (*s*), that the son should not, in such a case, be barred by the warranty of his father, unless any heritage descended to him of his father's side, and then he was to be barred only to the extent of the value of the heritage so descended. The force of a warranty was afterwards greatly restrained by other statutes, enacted to meet other cases (*t*); and the clause of warranty having been long disused in modern conveyancing, its chief force and effect were removed by clauses of two statutes of 1833, passed at the recommendation of the Real Property Commissioners (*u*).

Warranty now
ineffectual.

The old warranty of title was better suited to the transactions of the feudal times, in which it originated, than to modern dealings with land. When a transfer of land takes the form of a sale for a sum of money paid down and representing the full value of the land, it is obviously desirable to require *proof* of the vendor's

Proof of title
required in
modern times.

(*r*) Litt. ss. 697, 698, 699, 700.

(*s*) Stat. 6 Edw. I. c. 3.

(*t*) Stat. *De donis*, 13 Edw. I. c. 1, as construed by the judges; see Co. Litt. 378 b, n. (2);

Vaughan, 375; stats. 11 Hen. VII. c. 20, 4 & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 21.

(*u*) Stats. 3 & 4 Will. IV. c. 27, s. 89; 3 & 4 Will. IV. c. 74, s. 14.

title before completing the sale, as well as a guarantee of compensation in case of his title afterwards proving to be defective. It has been accordingly established in modern times that, on every sale of land, the vendor is bound to show a good title thereto (*x*). The proof so required is furnished by his giving evidence of the exercise of acts of ownership, particularly of the power of disposition, by himself or his predecessors over the land sold for a certain number of years back, and by deducing from previous dispositions and devolution of the land a right in himself to the fee simple or other estate sold. A vendor of land is therefore bound to furnish at his own expense (*y*) to the purchaser an abstract of his title to the property sold. This abstract must contain a statement of the material parts of every deed, will, or other instrument, by which any disposition of the property was made during the time for which title has to be shown; it must also contain a statement of every birth, death, marriage, bankruptcy, or other event material to the devolution of the estate contracted for (*z*). The vendor is further bound to verify the abstract by producing for examination by the purchaser or his solicitor the original deeds or documents abstracted, and the probates or office copies of the wills and other documents, of which the originals cannot be produced; also by furnishing proper evidence of every fact material to title (*a*). But the purchaser, in the absence of stipulation to the contrary, must now bear the expense of producing all documents of title, which are not in the vendor's possession (*b*), and of

Vendor bound
to show a
good title.

Abstract of
title.

Verification
of abstract.

(*x*) *Doe d. Gray v. Stanion*, 1 M. & W. 895, 701; *Sug. V. & P.* 16, 14th ed.; *Lysaght v. Edwards*, 2 Ch. D. 499, 507; *Ellis v. Rogers*, 29 Ch. D. 661, 670, 672.

(*y*) *Sug. V. & P.* 406, 14th ed.; *Re Johnson & Tustin*, 30 Ch. D. 42.

(*z*) See *Sug. V. & P. Ch. XI.*

pp. 405 *et seq.*, 14th ed.; 1 Dart V. & P. Ch. VIII. pp. 319 *et seq.*, 6th ed.

(*a*) *Sug. V. & P.* 406, 414 *et seq.*, 429—432, 447—450, 14th ed.; 1 Dart V. & P. pp. 159, 160, 350 *et seq.*, 470, 6th ed.

(*b*) See *Re Willett and Argyenti*, 5 Times L. R. 476.

procuring all other evidence of title, which the vendor has not in his possession (*c*). The purchaser also bears all the expense of the examination of the title-deeds by his solicitor (*d*). It is now a term of contracts for the sale of land, in the absence of stipulation to the contrary, that recitals, statements, and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of such facts, matters and descriptions (*e*). This may, of course, save a vendor from the necessity of furnishing evidence, which he would otherwise be obliged to give.

The vendor's obligation to show a *good* title is to show a good title according to the contract, *i. e.*, such title as he has contracted to give (*f*). The length of time for which title shall be shown is very frequently the subject of express agreement between buyers and sellers of land (*g*). But in the absence of stipulation to the contrary, a purchaser can now require title to be shown for the following periods. On the sale of a freehold (*h*) or copyhold estate, he can call for the title for the last forty years (*i*). But if the freehold sold should be land, formerly of copyhold or customary

(*c*) Stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 6; see Williams's Conveyancing Statutes, 47—50.

(*d*) See Sug. V. & P. 406, 429, 480; Williams's Conveyancing Statutes, 47—50.

(*e*) Stat. 37 & 38 Vict. c. 78, s. 2; see Williams's Conveyancing Statutes, 8—11.

(*f*) *Laurie v. Lee*, 7 App. Cas. 19.

(*g*) Any stipulation restricting the period, for which the purchaser would otherwise be entitled to require title to be shown, must be fair and explicit and must not

contain any misrepresentation as to facts within the knowledge of the vendor, or it will not be binding on the purchaser, in case specific performance of the contract is sought; *Re Banister, Broad v. Manton*, 12 Ch. D. 181; *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*h*) Whether of inheritance or for life or lives; see *ante*, p. 60.

(*i*) Stat. 37 & 38 Vict. c. 78, s. 1; see Williams's Conveyancing Statutes, 2; 1 Dart V. & P. 324, 6th ed.

Leaseholds
for years.

Adwovson.

Good root of
title required.

tenure, which has been enfranchised (*k*), he will not have the right to call for the title to make the enfranchisement (*l*). On the sale of leaseholds for years, he can require an abstract and production of the lease, whatever be its date. And if the lease be not more than forty years old, he can call for the subsequent title under the lease to the date of the contract: but if the lease be more than forty years old, all the subsequent title he can require is the title for the forty years next before the contract (*m*). And he will not in either case be entitled to call for the title to the freehold, or to any leasehold reversion (*n*). Not less than one hundred years' title must be shown to an adwovson (*o*). Upon the sale of tithes or other property held under a grant from the Crown, the original grant must be shown, whatever be its date; after which, it appears, the title for the forty years next before the contract is all that can be required (*p*). And upon the sale of a reversionary interest, its creation must be shown, whatever be its antiquity (*q*). Furthermore, if an abstract of title commence with an instrument of disposition, it must be such as will form what is called a good root of title; that is to say, it must, as a rule, be an instrument dealing with the whole estate, legal and equitable, in the property sold, containing a description by which the property can be identified, and containing nothing to cast any doubt on the title of

(*k*) *Ante*, pp. 442—444.

(*l*) Stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 2; see Williams's Conveyancing Statutes, 81.

(*m*) Sug. V. & P. 368, 370, 14th ed.; *Frend v. Buckley*, L. R., 5 Q. B. 213; stat. 37 & 38 Vict. c. 78, s. 1; 1 Dart V. & P. 294, 5th ed.; Williams on Real Property, 450, 18th ed.; see Williams's Conveyancing Statutes, 2, 3.

(*n*) Stat. 37 & 38 Vict. c. 78, s. 2; 44 & 45 Vict. c. 41, s. 3,

sub-s. 1; see Williams's Conveyancing Statutes, 4, 5, 29.

(*o*) Sug. V. & P. 367, 14th ed.; 1 Dart V. & P. 293, 5th ed., 334, 6th ed.; Williams on Real Property, 449—451, 18th ed.; see Williams's Conveyancing Statutes, 2, 3.

(*p*) Sug. V. & P. 367, 14th ed.; 1 Dart V. & P. 295, 5th ed., 336, 6th ed.

(*q*) 1 Dart V. & P. 294, 5th ed., 335, 6th ed.; see Williams's Conveyancing Statutes, 3, 4.

the disposing parties. If it be deficient in any of these particulars, the purchaser may require further evidence to supply the deficiency (*r*). For example, if the abstract commence with a will containing a general devise of the testator's real estate, under which the property sold is alleged to have passed, the purchaser will be entitled to require evidence of the testator's seisin (*s*). But a conveyance in fee on a sale or by way of mortgage is a good root of title. It is obvious that, in consequence of the rule requiring a good root of title, a vendor may have to go back more than forty years, if he wish to commence his abstract with a document, which shall be free from objection (*t*).

Before the year 1875, the rule was that title might be required to be shown for sixty years, in all cases where forty years' title can now be called for (*u*). The origin of this rule is sometimes attributed to the fact that under the Statutes of Limitation applicable to the old real and mixed actions (*x*) nothing less than sixty years' possession would bar adverse claims to the land (*y*). But even sixty years' possession will not necessarily give a sure title to land, as against all the world; for if the land had been limited for an estate tail or for life, the right of the reversioner or remainder man to enter into possession would not accrue till after the determination of the particular estate (*z*); and

(*r*) See 1 Dart, V. & P. Ch. VIII. s. 4, pp. 295 *et seq.*, 5th ed.; 337 *et seq.*, 6th ed.

(*s*) See *Furr v. Longgrove*, 4 Drew. 170.

(*t*) As a rule, the purchaser now has no right to inquire into or require evidence of, or object to the title prior to the time fixed, by the contract or by law, for the commencement of title; but to this rule there are several important exceptions; see stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 3;

Williams's Conveyancing Statutes, 31—41, 531—535; *Nottingham Patent Brick & Tile Co. v. Butler*, 16 Ch. D. 778.

(*u*) Sug. V. & P. 365 *et seq.*, 407; *Cooper v. Emery*, 1 Ph. 388.

(*x*) See *ante*, p. 532, n. (*i*).

(*y*) See stat. 32 Hen. VIII. c. 2; 3 Black. Comm. 193—198; Sug. V. & P. 365, 14th ed.

(*z*) *Ante*, pp. 303, 313—315, 533.

under the present (a) as well as the old (b) Statutes of Limitation, circumstances might occur to render possible the recovery of land by a reversioner or remainderman more than sixty years after the dispossession of the tenant in tail or for life. Another reason is accordingly given for the rule; namely, that the term of sixty years corresponds with the ordinary duration of human life, and inquiry into the title for the duration of an ordinary lifetime affords some safeguard against the existence of the adverse claims, which might not have accrued until the death of a particular tenant (c). The period of sixty years was reduced to forty by the Vendor and Purchaser Act, 1874 (d), on no other ground, apparently, than that in practice purchasers were generally found willing to accept a forty years' title.

Sale of land
subject to in-
cumbrances.

It is not necessary for a vendor of land to show that he is himself absolutely entitled to the whole estate contracted to be sold; a good title will have been shown if it appear that the vendor has an equitable interest enabling him to procure the conveyance of the estate to the purchaser (e). If any other persons, besides the vendor, be interested in the land sold, the abstract of title will of course disclose their names and the nature of their interests. And if the vendor desire to complete the sale without resorting to the aid of the Court, the concurrence of all these parties must be obtained by him,

(a) *Ante*, pp. 532—534.

(b) See Sug. V. & P. 609, 11th ed., 366, 14th ed.

(c) See Mr. Brodie's opinion, 1 Hayes's Conveyancing, 584; 1 Ph. 539.

(d) Stat. 37 & 38 Vict. c. 78, s. 1. In the same way the further restrictions on a purchaser's rights made by the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41, s. 8; *ante*, pp. 543, 544) appear to

have been introduced because purchasers commonly submitted to like restrictions by express agreement; see Williams's Conveyancing Statutes, 29 *et seq.*

(e) See 8 Ves. 436; *Townsend v. Champenown*, 1 Y. & J. 449; Sug. V. & P. 217, 218, 349, 423—425, 14th ed.; 2 Dart, V. & P. 321—326, 1177 *et seq.*, 6th ed.; *Re Bryant and Barningham's Contract*, 44 Ch. D. 218.

in order that an unincumbered estate, in fee simple or otherwise as contracted for, may be conveyed to the purchaser. Thus, if the lands be in mortgage, the mortgagee must be paid off out of the purchase-money, and must join to relinquish his security and convey the legal estate (*f*). If the widow of any previous owner is entitled to dower out of the lands (*g*), she must concur in the conveyance; if the lands are subject to a rent-charge (*h*), the person entitled thereto must join to release the lands from his charge. In the absence of stipulation to the contrary, the expense of the concurrence in the conveyance to the purchaser of all necessary parties, other than the vendor, must be paid by the vendor (*i*). Under the Conveyancing Act of 1881 (*k*), upon the sale of land subject to any mortgage, lien or charge, whether of a capital or an annual sum, the Court has power to allow payment into Court of a sum of money sufficient to provide for the amount charged on the land and future costs, and thereupon to declare the land to be freed from the charge, and to make any order for conveyance, or vesting order, proper for giving effect to the sale. This enables a vendor to procure land, which is subject to mortgages or charges, to be conveyed to the purchaser for an unincumbered estate, without the concurrence of the incumbrancers.

On every mortgage of land, the title is investigated in the same manner as upon a sale; for to acquire a good marketable title is of even greater importance to a mortgagee, who only wants security for his money, than to a purchaser, who may buy for occupation. A good *marketable* title is one, which will enable the party acquiring it to sell the property without the necessity

Proof of title
on mortgage.

Good market-
able title.

(*f*) *Ante*, p. 505.

(*g*) *Ante*, pp. 295 *et seq.*

(*h*) *Ante*, pp. 394 *et seq.*

(*i*) *Sug. V. & P.* 557, 558, 561, 14th ed.; 2 *Dart, V. & P.* 798,

814, 6th ed.; 1 *Davidson, Prec. Conv.* 570—572, 612, 4th ed.

(*k*) *Stat.* 44 & 45 *Vict. c.* 41, s. 5; see s. 2 (*viii*).

of making special conditions of sale restrictive of the purchaser's rights. As we have seen, a mortgagee's power of sale affords the best means of realizing his security (*l*); and he cannot safely accept a title, which is at all likely to hamper the exercise of his most efficient remedy. Here it may be pointed out that the relation of intending mortgagor and mortgagee is very different from that of vendor and purchaser. A vendor and purchaser of land are parties to a contract, which may be decreed to be specifically enforced, at the instance of either of them, under the equitable jurisdiction of the Court (*m*). Hence their respective rights are strictly defined from the moment they have signed the contract for sale (*n*). But it is not usual for mortgagees to bind themselves by contract in contemplation of making a loan on real security (*o*); and even if they were to do so, the Court will not specifically enforce an agreement to lend or borrow money (*p*).

Proof of title
on contract to
grant lease.

Upon a contract to grant a lease for a term of years, the rule formerly was that the intended lessor might be called upon to show a good title, the grant of a lease being regarded as equivalent, in this respect, to the sale of a leasehold interest (*q*). But now, in the absence of stipulation to the contrary, the intended lessee has no right, under such a contract, to call for the title to the freehold (*r*).

Upon a contract for an *underlease*, however, the proposed lessee still has the right to call for an abstract and

(*l*) *Ante*, p. 512.

(*m*) See Seton on Decrees, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 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production of the lease, under which his intending lessor holds, and of the subsequent or the last forty years' title thereunder, in the same manner as if he had contracted to buy the lease (*s*). But he has now no right, in the absence of stipulation to the contrary, to call for the title to any leasehold *reversion* expectant on any lease, under which his proposed lessor holds (*t*). The covenants and conditions, which can be required to be inserted in a lease, in the absence of special stipulation, have been already referred to (*u*).

On the completion of any sale or mortgage of land, the purchaser or mortgagee becomes entitled to all documents of title, which relate exclusively to the property dealt with (*x*); and these are always handed over to him. The possession of the title-deeds is of the greatest importance; for if the deeds were not required to be delivered, it is evident that property might be sold or mortgaged over and over again to different persons, without much risk of discovery. The only guarantee, for instance, which a purchaser has that the lands he contracts to purchase have not been mortgaged, is that the deeds are in the possession of the vendor. It is true that in the counties of Middlesex and York, registries have been established, a search in which will lead to the detection of all dealings with the property (*y*); but these registries, though existing in Scotland and Ireland, do not extend to the remaining counties of England or to Wales. Generally speaking, therefore, the possession of the deeds is all that a purchaser has to depend on: in most cases, this protection, coupled with an examination of the title they disclose, is found to be sufficient: but there are certain circumstances in which the possession of the deeds can

Title deeds.

Importance of their possession.

Registration.

(*s*) *Ante*, p. 544.

(*x*) *Sug. V. & P.* 407, 433

(*t*) *Stat. 44 & 45 Vict. c. 41, s. 14th ed.*

(*y*) See *ante*, pp. 196, 526.

(*u*) *Ante*, p. 470, n. (*s*).

Possession of
deeds no safe-
guard against
a rent-charge:

nor against
the vendor
being tenant
for life only.

afford no security. Thus the possession of the deeds is no safeguard against an annuity or rentcharge payable out of the lands; for the grantee of a rentcharge has no right to the deeds (2). So the possession of the deeds, showing the conveyance to the vendor of an estate in fee simple, is no guarantee that the vendor is not now actually seised only of a life estate; for, since he acquired the property, he may, very possibly, have married; and on his marriage he may have settled the lands on himself for his life, with remainder to his children. Being then tenant for life, he will, like every other tenant for life, be entitled to the custody of the deeds (a); and if he should be fraudulent enough to suppress the settlement, he might make a conveyance from himself, as though seised in fee, deducing a good title, and handing over the deeds; but the purchaser, having actually acquired by his purchase nothing more than the life interest of the vendor, would be liable, on his decease, to be turned out of possession by his children; for, as marriage is a valuable consideration, a settlement then made cannot be set aside by a subsequent sale made by the settlor. Against such a fraud as this the registration of deeds seems the only protection. In some cases, also, persons are entitled to an interest, which they would like to sell, but are prevented, from not having any deeds to hand over.

(2) The late author once met with an instance in which lands were, from pure inadvertence, sold as free from incumbrance, when in fact they were subject to a rentcharge, which had been granted by the vendor on his marriage to secure the payment of the premiums of a policy of insurance on his life. The marriage settlement was, as usual, prepared by the solicitor for the wife; and the vendor's solicitor, who conducted the sale, but had never seen the settlement, was not aware that any charge had been made on the

lands. The vendor, a person of the highest respectability, was, as often happens, ignorant of the legal effect of the settlement he had signed. The charge was fortunately discovered by accident shortly before the completion of the sale.

(a) Sugd. Vend. & Pur. 445, n. (1), 14th ed.; *Leathes v. Leathes*, 5 Ch. D. 221. Even an equitable tenant for life has been declared entitled to the custody of the title deeds; *Re Burnaby's Settled Estates*, 42 Ch. D. 621.

Thus, if lands be settled on A. for his life, with remainder to B. in fee, A. during his life will be entitled to the deeds; and B. will find great difficulty in disposing of his reversion at an adequate price; because, having no deeds to give up, he has no means of satisfying a purchaser that the reversion has not previously been sold or mortgaged to some other person. If, therefore, B.'s necessities should oblige him to sell, he will find the want of a registry for deeds the cause of a considerable deduction in the price he can obtain. It may here be remarked, that as few people would sell a reversion unless they were in difficulties, equity, whenever a reversion was sold, threw upon the purchaser the onus of showing that he gave the fair market price for it (b). But it is now provided that no purchase, made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue (c).

Difficulty in sale of a reversion, for want of evidence that no previous sale has been made.

Sale of reversions.

New enactment

Again, if lands are subject to any mortgage made before the year 1882, there may be a difficulty in dealing with them on account of the absence of title deeds. For a mortgagee under such a mortgage who has possession of the title deeds, cannot as a rule be compelled to produce them for inspection, without being paid off (d). With regard, however, to mortgages made after the year 1881, it is enacted by a section of the Conveyancing Act of 1881 (e), which has effect notwithstanding

Mortgagor could not inspect deeds in possession of mortgagee, except by consent.

New enactment.

(b) *Lord Aldborough v. Trye*, 7 Cl. & Fin. 436; *Davies v. Cooper*, 5 My. & Cr. 270; *Sugd. Vend. & Pur.* 278, 14th ed.; *Edwards v. Burt*, 2 De Gex, M. & G. 55.

(c) Stat. 31 Vict. c. 4. See *Lord Aylesford v. Morris*, L. R., 8 Ch. 484; *O'Rourke v. Bolingbroke*, 2 App. Cas. 814; *Fry v. Lane*, 40 Ch. D. 812.

(d) *Chichester v. Marquis of*

Donegall, L. R., 5 Ch. 497; *Sugd. Vend. & Pur.* 435, 445, 14th ed. See 1 *Dart, V. & P.* 475, 6th ed.; *Seton on Decrees*, 1058, 4th ed.; *Davidson, Prec. Conv. Vol. II.*, Part II., p. 251, 4th ed.

(e) Stat. 44 & 45 Vict. c. 41, s. 16; see *Williams's Conveyancing Statutes*, 124.

ing any stipulation to the contrary, that a mortgagor, as long as his right to redeem subsists, shall, by virtue of that Act, be entitled, at his own cost, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Title deeds relating to other land.

Acknowledgment of right to production of documents.

Where the documents of title relate, not only to the land sold, but also to other property, which the vendor retains, he is entitled to retain the documents (f). Where the title-deeds cannot be delivered over to a purchaser, he is entitled to require the vendor to give or procure him a statutory written *acknowledgment* of his right to their production, and to delivery of copies thereof (g). When such an acknowledgment is given by a person, who retains possession of documents, it has the effect provided in the 9th section of the Conveyancing Act of 1881 (h); which is, shortly, to impose on every

(f) Stat. 37 & 38 Vict. c. 78, s. 2. This rule does not apply to the case of a mortgage, as to which

see Davidson, *Prec. Conv.* Vol. II., Part II., 238 *et seq.*, 253, 4th ed.

Attested copies.

(g) In such cases the purchaser was formerly entitled to a *covenant* for production of the title deeds; but now any liability to give such a covenant will be satisfied by the statutory acknowledgment. The purchaser was also entitled to require attested copies to be furnished to him, at the vendor's expense, of any documents, of which he was entitled to a covenant for production, except instruments on record. But, though he is still entitled to have such attested copies, the rule now is that he must bear the expense of them himself. The statutory acknowledgment must also be prepared at the purchaser's expense, but the vendor must bear the expense of the perusal and execution thereof on behalf of and by himself and all necessary parties other than the purchaser. A purchaser is entitled to the statutory acknowledgment in respect of all such documents, not delivered to him, as are necessary to make a good title according to the contract; except documents (not being in the vendor's possession or power), of which the purchaser can obtain good evidence himself, as deeds of bargain and sale enrolled or copies of court roll. See *Cooper v. Emery*, 1 Ph. 888; Sug. V. & P. 34, 446—450, 453, 14th ed.; stat. 37 & 38 Vict. c. 78, s. 2; 44 & 45 Vict. c. 41, ss. 3 (sub-s. 6), 9 (sub-s. 8); Williams's *Conveyancing Statutes*, 12—14, 43.

(h) Stat. 44 & 45 Vict. c. 41. See Williams's *Conveyancing Statutes*, 94. A statutory acknowledgment, unless given by deed,

appears to require the same stamp as an agreement; see *ante*, p. 178, n. (f).

possessor of the documents, during such time only as they remain in his possession or control, an obligation to produce them whenever reasonably required for proving or supporting the title of any person entitled to the benefit of the acknowledgment, and to deliver to him true copies of or extracts from them. This obligation will be enforceable by, but at the expense of, the person to whom the acknowledgment is given, or any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under him, or otherwise becoming through or under him interested in or affected by the terms of any of the documents. The statutory acknowledgment does not confer any right to damages for loss or destruction of, or injury to the documents to which it relates (*i*). But, under the same 9th section of the Conveyancing Act, 1881, if a person retaining possession of documents gives to another a written undertaking for safe custody thereof, that will impose on every possessor of the documents, so long as he has possession or control of them, an obligation to keep them safe, whole, uncanceled and undefaced, unless prevented from doing so by fire or other inevitable accident (*k*). A purchaser entitled to require a statutory acknowledgment for production of documents would appear to be also entitled, as a rule, to require an undertaking for their safe custody (*l*). So that a vendor, who desires to limit his liability to that imposed by the statutory acknowledgment, should be careful to stipulate expressly that he will give no undertaking for the safe custody of any documents retained. Such a stipulation is usually made on sales by trustees. An acknowledg-

Undertaking
for safe
custody of
documents.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 9, sub-s. 6.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 9, sub-s. 9.

(*l*) The common form of the covenant for production of title deeds in use before 1882 (*ante*, p. 552, n. (*g*)), included a covenant

for safe custody. And the statutory undertaking will now satisfy any liability to give a covenant for safe custody of documents. See 1 Davidson, Prec. Conv. 222, 4th ed.; stat. 44 & 45 Vict. c. 41, s. 9, sub-s. 11; Williams's Conveyancing Statutes, 101, 102.

ment of right to production of title-deeds, to take effect under the statute, must be given by the person who retains possession of the deeds; and this will not necessarily be the vendor. Thus, if part of an estate in mortgage be sold by the mortgagor with the concurrence of the mortgagee, the latter will be the person who retains possession of the title-deeds (*m*). In this case therefore the vendor, to satisfy his liability to the purchaser (*n*), must, if he can, procure the statutory acknowledgment to be given by the mortgagee (*o*). But it will be no objection to the title, that the vendor is unable to procure for the purchaser a statutory acknowledgment from the person in possession of the title-deeds, if the purchaser will have an equitable right to their production independently of any acknowledgment (*p*). It appears that, when part of an estate is sold and the vendor retains the title deeds, the purchaser will have an equitable right to their production in proof of his title, without any express agreement therefor (*q*).

Search in
Middlesex
and York
registries.

When the lands sold or to be mortgaged are situated in either of the counties of Middlesex or York, search is made in the registries established for those counties, to discover if there be any registered assurance affecting the lands, which has not been disclosed by the abstract (*r*); and a memorial of the conveyance is of

(*m*) See *ante*, p. 549.

(*n*) *Ante*, p. 552.

(*o*) Under the practice before 1882, a covenant for production of the title deeds should have been entered into by the person entitled to their possession in respect of the legal estate in the land; see *Sug. V. & P.* 453 and *n.* (1), 14th ed.; 1 *Dart, V. & P.* 554, 556, 5th ed.; 1 *Davidson, Prec. Conv.* 590, 591, 4th ed.

(*p*) *Stat.* 37 & 38 *Vict.* c. 78, s. 2; see *Williams's Conveyancing Statutes*, 12.

(*q*) *Fain v. Ayers*, 2 *S. & S.* 533, 535; *Sug. V. & P.* 445, *n.* (1), 453, *n.* (1), 14th ed.

(*r*) *Ante*, pp. 196, 526. By *stat.* 47 & 48 *Vict.* c. 54, ss. 20–28, 31, provision is made for official search in the Yorkshire registers, and the issue of a certificate of the result of such a search. Like provision as to Middlesex is made by the Rules under the Land Registry (*Middlesex Deeds*) Act, 1891; *W. N.* 18th Feb. 1892.

course duly registered as soon as possible after its execution. As to lands in all other counties also, there are certain matters affecting the title, of which every purchaser can readily obtain information. Thus, if any estate tail has existed in the lands, the purchaser can always learn whether or not it has been barred; for the records of all fines and recoveries, by which the bar was formerly effected (*s*), are preserved in the Public Record Office (*t*); and the deeds, which have been substituted for those assurances were required to be enrolled, formerly in the Court of Chancery (*u*), and since the year 1879 in the Central Office of the Supreme Court (*v*). Conveyances executed by married women under the provisions of the Act for the abolition of fines and recoveries before the year 1883 can also be discovered by a search in the index of the certificates of the acknowledgment of such deeds (*x*), which is now kept at the same Central Office (*y*). So we have seen that search is always made in the register of writs and orders affecting land, in order to discover if the land has been taken in execution (*z*); also for registered pending actions, by which the purchaser or mortgagee would be bound (*a*). Again, judgments entered up before the 23rd of July, 1860, and debts to the Crown incurred before the 2nd of November, 1865, are charges on land, if duly registered; and if the vendor or mortgagor, or

Search for
fines, reco-
veries, and
disentailing
deeds.

Deeds
acknowledged
by married
women before
the year 1883.

Search for
writs and
orders affect-
ing land, and
lis pendens.

Search for
judgments and
Crown debts.

(*s*) *Ante*, pp. 92, 94.

(*t*) Established by stat. 1 & 2 Vict. c. 92.

(*u*) *Ante*, pp. 93, 94. As to fines and recoveries in Wales and Cheshire, see stat. 5 & 6 Vict. c. 32.

(*v*) Stat. 42 & 43 Vict. c. 78, n. 5; Rules of the Supreme Court, 1883, Ord. LXI. r. 9. An official search for such deeds may now be directed to be made, and a certificate of the result obtained; Ord. LXI. r. 23; see Williams's Conveyancing Statutes, 273, 274.

(*z*) See *ante*, p. 244 and n. (*c*);

Williams's Conveyancing Statutes, 281—285.

(*y*) An official search for such conveyances may be directed to be made and a certificate of the result obtained: see stat. 45 & 46 Vict. c. 39, ss. 2, 7; Rules of the Supreme Court, 1883, Ord. LXI. r. 23; Williams's Conveyancing Statutes, 282, 283, 268, 270, 273, 281—285, 477—479, 483, 486, 490, 491.

(*a*) *Ante*, pp. 249, 250, 266, 268.

(*a*) *Ante*, pp. 267, 268

any former owner might have created such incumbrances, they should be searched for (*b*). And where liability to the Crown may have been incurred after the 1st of November, 1865, the register of Crown writs or processes of execution should be searched (*c*). It is also usual to search the register of life annuities granted (otherwise than by marriage settlement or will) after the 25th of April, 1855 (*d*). On a sale or mortgage of agricultural land, it is desirable to search for land charges affecting the same and registered under the Land Charges, &c., Act of 1888 (*e*); and also for land improvement charges not so registered (*f*). On the sale or mortgage of copyholds, the Court Rolls are always searched (*g*). Lastly, the bankruptcy of and vendor or mortgagor, or his insolvency prior to the Bankruptcy Act, 1861 (*h*), may be discovered by a search in the records of the Bankrupt or Insolvent Courts; and it is the duty of the purchaser's or mortgagee's solicitor to make such search, if he has any reason to believe that the vendor or mortgagor is or has been in embarrassed circumstances (*i*). In such a case, search should also be made for any deed of arrangement, which may affect the land (*k*). Searches are usually confined to the period which has elapsed from the last purchase deed,—the search presumed to

Search for
Crown process
of execution.

Search for
life annuities.

Search for
Land Charges.

Search in
Court Rolls.

Search for
bankruptcy
or insolvency;

and for deeds
of arrange-
ment.

Practice as
to searches.

(*b*) *Ante*, pp. 246—251, 260, 261, 268. It is not necessary to search for judgment or Crown debts against the names of trustees, or of mortgagees, who have been or are to be paid off; *Whitworth v. Gaugain*, 1 Ph. 728; *ante*, p. 523.

(*c*) *Ante*, pp. 261, 268.

(*d*) *Ante*, pp. 394, 395. Life annuities, which may have been charged on the land for money or money's worth prior to the 10th of August, 1854, may generally be discovered by a search amongst the memorials of such annuities; see *ante*, p. 394, n. (*l*). The lands charged, however, are not neces-

sarily mentioned in the memorial. This search must now be made in the Central Office; but at the present time it can rarely be necessary.

(*e*) See *ante*, pp. 120, 121, 487.

(*f*) *Ante*, p. 121; as to these searches, see Elphinstone and Clark on Searches, 109 *et seq.*

(*g*) Elphinstone and Clark on Searches, 161; 1 Dart, V. & P. 454, 497, 5th ed.; 523, 566, 6th ed.

(*h*) *Ante*, pp. 253—255.

(*i*) *Cooper v. Stephenson*, 16 Jur. 424; 21 L. J., Q. B. 292.

(*k*) *Ante*, p. 254.

have been made on behalf of the former purchaser being generally relied on as a sufficient guarantee against latent incumbrances prior to that time (*l*).

The bulk of the purchase money is never paid, on a sale of land (*m*), nor is mortgage money usually advanced, until the title has been investigated in the manner described (*n*), and the necessary searches made. But if all these inquiries have been satisfactorily prosecuted, the transaction is then completed by conveyance of the land on the one hand, and payment of the consideration money on the other. As a rule, a person bound to pay money to another will not be discharged from his liability by payment to the other's solicitor, unless the solicitor be expressly authorised to receive the money (*o*). But by the Conveyancing Act of 1881 (*p*), where a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed or the indorsed receipt being

Payment of purchase or mortgage money on conveyance.

Payment to vendor's or mortgagor's solicitor.

(*l*) Williams on Real Property, 257, 1st ed.; 465, 13th ed.; Elphinstone and Clark on Searches, 50, 148, 149. As we have seen (*ante*, pp. 268, 269), in the case of matters, whereof entries are required or allowed by statute to be made in the Central Office, or which may be entered in the registers established by the Land Charges Act of 1888, official searches may be made, and a certificate of the result obtained. And it is enacted that such a certificate shall be conclusive in favour of a purchaser. It appears, however, that such a certificate will merely be conclusive evidence, in favour of a purchaser, that there are no entries against the person named therein *by the description therein applied to him*. Hence private searches may be preferred, as affording a better opportunity for tracing entries against the same person under a different

description; see the work last cited (which should be consulted on the subject of searches generally), pp. 166—168.

(*m*) On all sales by auction and many private sales, a deposit of a certain percentage of the purchase money is made, on entering into the contract, as a guarantee for its due performance; see *Hove v. Smith*, 27 Ch. D. 89.

(*n*) *Ante*, p. 542.

(*o*) See *Wilkinson v. Candlish*, 5 Ex. 91; *Viney v. Chaplin*, 2 De G. & J. 468, 477, 481; *Bourdillon v. Roche*, 27 L. J., N. S. Ch. 681; *Ex parte Swinbanks*, 11 Ch. D. 525.

(*p*) Stat. 44 & 45 Vict. c. 41, s. 56. Stat. 51 & 52 Vict. c. 59, s. 2 (altering the law as laid down in *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387), now enables trustees so to authorize their solicitor to receive money due to them.

Payment to
trustees.

Trustee's
receipt for
money, securi-
ties and other
personal prop-
erty, now a
good dis-
charge.

signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any other authority in that behalf. Formerly it was a rule of equity, that any person paying money or assigning other personal estate to a trustee thereof was bound to see that the same was duly applied pursuant to the trust, unless exempted from that obligation by the intention of the author of the trusts; which intention might be either expressly declared or implied from the nature of the trusts (*q*). But it is now enacted (*r*) that the receipt in writing of any trustees or trustee for any money, securities or other personal property or effects payable, transferable or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

Not only is proof of title required in modern dealings with land (*s*), but a guarantee of indemnity, in case the

(*q*) See Sug. V. & P. 657 *et seq.*, 14th ed.; Lewin on Trusts, 452 *et seq.*, 8th ed. It was consequently the practice to insert in all instruments creating a trust a clause, called the receipt clause, declaring that the receipt of the trustees should discharge any person paying money to them from the obligation so imposed. This practice was discontinued after the passing of Lord Cranworth's Act; see next note; Davidson, Prec. Conv. Vol. III. Pt. I. p. 226, Pt. II. p. 719, n., 3rd ed.

(*r*) Stat. 44 & 45 Vict. c. 41, s. 36, which applies to trusts created either before or after the

commencement of the Act. Also by stat. 22 & 23 Vict. c. 85, s. 23, the receipt of a trustee for any *purchase or mortgage money* payable to him is a good discharge, unless a contrary intention be expressly declared by the instrument creating the trust. Lord Cranworth's Act, stat. 23 & 24 Vict. c. 145, s. 29, provided that trustees' receipts should be good discharges for any *money* payable to them; but this provision applied only in the case of instruments executed after the Act, and was repealed by stat. 44 & 45 Vict. c. 41, s. 71.

(*s*) *Ante*, p. 541.

title should afterwards prove defective, is also taken. This guarantee, however, does not follow the form of the old warranty, which bound the warrantor to give lands of equal value in default of maintaining his title (*t*); but it is contained in certain covenants for title, as they are termed, given by the party conveying the land; for breach of which covenants the remedy is an action for damages (*u*). Unlike the simple clause of warranty in ancient days, modern covenants for title were five and are now four in number. The first covenant was, that the vendor is seised in fee simple; the next, that he has good right to convey the lands; the third, that they shall be quietly enjoyed; the fourth, that they are free from incumbrances; and the last that the vendor and his heirs will make any further assurance for the conveyance of the premises which may reasonably be required. But during the second quarter of the present century the first covenant went out of use, the second being evidently quite sufficient without it. Covenants for title vary in comprehensiveness, according to the circumstances of the case. A vendor is not bound to give absolute covenants for the title to the lands he sells (*x*), but is entitled to limit his responsibility to the acts of those who have been in possession since the last sale of the estate; so that if the land should have been purchased by his father, and so have descended to the vendor, or have been left to him by his father's will, the covenants will extend only to the acts of his father and himself (*y*): but if the vendor should himself have purchased the lands, he will covenant only as to his own acts (*z*), and the purchaser must ascertain by an examination of the

Covenants
for title.

Covenants
for title by a
vendor.

(*t*) *Ante*, p. 540.

(*u*) Sug. V. & P. 610 *et seq.*, 14th ed.; *Jenkins v. Jones*, 9 Q. B. D. 129.

(*x*) *Church v. Brown*, 15 Ves. 263.

(*y*) Sugd. Vend. and Pur. 574, 14th ed.; 1 Dart, V. & P. 616, 617, 6th ed.

(*z*) See next chapter and Appendix (A).

previous title, that the vendor purchased what he may properly re-sell. A mortgagor, on the other hand, always gives absolute covenants for title; for those who lend money are accustomed to require every possible security for its repayment. When a sale is made by trustees, who have no beneficial interest in the property themselves, they merely covenant that they have respectively done no act to encumber the premises. If the money is to be paid over to A. or B. or any persons in fixed amounts, the persons who take the money are expected to covenant for the title (*a*); but, if the money belongs to infants or other persons who cannot covenant, or is to be applied in payment of debts or for any similar purpose, the purchaser must rely for the security of the title solely on the accuracy of his own investigation (*b*).

Covenants for title by a mortgagor.

Covenants by trustees.

On a conveyance of freeholds, the covenants for title are always included in the deed of conveyance: but on the sale or mortgage of copyhold lands these covenants are usually contained in a deed of covenant to surrender, by which the surrender itself is immediately preceded (*c*), the whole being regarded as one transaction (*d*). It is no longer usual, however, to insert in such deeds express covenants for title at length; the present practice is by the use of the proper statutory expressions to incorporate in deeds of conveyance the covenants for title contained in the Conveyancing Act of 1881 (*f*). For by virtue of this Act certain covenants

(*a*) Sugd. Vend. and Pur. 574, 14th ed.

(*b*) Ibid.

(*c*) *Ante*, p. 519. By the Stamp Act, 1891, stat. 54 & 55 Vict. c. 39, replacing 38 & 34 Vict. c. 37, such a deed of covenant is now charged with a duty of 10s.; and if the *ad valorem* duty on the sale or mortgage is less than that

sum, then a duty of equal amount only is payable.

(*d*) *Riddell v. Riddell*, 7 Sim. 529.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 7; see also sects. 59 (sub-s. 2), 60 (sub-s. 2) 64; Williams's Conveyancing Statutes, 74-92, 234, 236, 244.

for title are implied, in certain cases, upon conveyances made after the year 1881. These cases and the covenants so implied appear to be the following, the implied covenant being in each case made with the person or persons to whom the conveyance is made:—

(1) *In a conveyance for valuable consideration, other than a mortgage, covenants by a person who conveys and is expressed to convey as beneficial owner, for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance limited to the acts of the person who so conveys, and of any one through whom he derives title, otherwise than by purchase for value. The expression "purchase for value" does not in this case include a conveyance in consideration of marriage (g):*

(2) *In a conveyance of leasehold property for valuable consideration, other than a mortgage, the same covenants by a person who conveys and is expressed to convey as beneficial owner as are implied in case (1) (h); and a further covenant (similarly limited) that the lease is valid, that the rent has been paid, and that the covenants have been performed (i):*

(3) *In a conveyance by way of mortgage, absolute covenants for title by a person who conveys and is expressed to convey as beneficial owner (k):*

(4) *In a conveyance by way of mortgage of leasehold property, the same covenants by a person who conveys and is expressed to convey as beneficial owner as are implied in case (3) (l), and, in addition, an absolute covenant for validity of the lease creating the term for which the land is held, and for indemnity against the rent and covenants of the lease, so long as any money remains on the security of the conveyance (m):*

(5) *In a conveyance by way of settlement, a covenant for further assurance by a person who conveys and is expressed to convey as settlor limited to himself, and every person deriving title under him subsequently to that conveyance (n):*

(g) Sect. 7, sub-s. 1 (A); see Williams's Conveyancing Statutes, 74, 78—82.

(h) An assignment of leaseholds is included in case (1); see sect. 2; Williams's Conveyancing Statutes, 27, 88.

(i) Sect. 7, sub-s. 1 (B); see Williams's Conveyancing Statutes, 74, 78, 82, 88.

(k) Stat. 44 & 45 Vict. c. 41, s. 7, sub-s. 1 (C); see Williams's Conveyancing Statutes, 74, 78,

88—85.

(l) A mortgage of leaseholds is included in case (3); see sect. 2; Williams's Conveyancing Statutes, 27, 85.

(m) Stat. 44 & 45 Vict. c. 41, s. 7, sub-s. 1 (D); see Williams's Conveyancing Statutes, 74, 78, 85.

(n) Sect. 7, sub-s. 1 (E); see Williams's Conveyancing Statutes, 74, 78, 86.

(6) *In any conveyance, a covenant against incumbrances by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant is to be deemed to extend to every such person's own acts only (o) :*

(7) *Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, is to be deemed to convey and to be expressed to convey as beneficial owner, and a covenant on his part to be implied accordingly (p) :*

(8) *Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then the wife is to be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there is also to be implied, first, a covenant on the part of the husband as the person giving that direction, and, secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife (q).*

Cases in which covenants for title are not now implied.

(Sect. 7, sub-sect. 4.) *Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance (r).*

Copyholds.

(Sect. 7, sub-sect. 5.) *In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed conferring the right to admittance to copyhold or customary land (s).*

Benefit of implied covenant to run with the land.

(Sub-sect. 6.) *The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested (t).*

(o) Sect. 7, sub-s. 1 (F); see Williams's Conveyancing Statutes, 74, 78, 87.

(p) Sect. 7, sub-s. 2; see Williams's Conveyancing Statutes, 87, 88.

(q) Sect. 7, sub-s. 3; see Williams's Conveyancing Statutes,

88—91.

(r) See Williams's Conveyancing Statutes, 91.

(s) See Williams's Conveyancing Statutes, 92.

(t) See Williams's Conveyancing Statutes, 92, 93.

(Sub-sect. 7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section (u)

By means of the above enactments suitable covenants for title may be incorporated in a deed of conveyance of freeholds or leaseholds upon a sale, mortgage or settlement, or in a deed of covenant to surrender copyholds. But to accomplish this the exact expressions employed in the Act must be used; otherwise no covenant will be implied. The use of statutory covenants for title will be illustrated in the next chapter.

Formerly some words used in conveyancing in themselves implied a guarantee of good title. Thus we have seen (x) that the word *give* implied a personal warranty, and the word *grant* was supposed by some to imply a warranty, unless followed by an express covenant, imposing on the grantor a less liability (y). At common law too, an exchange and a partition between coparceners implied a mutual right of re-entry, on the eviction of either of the parties from the lands exchanged or partitioned (z). And, by the former Registry Acts for Yorkshire, the words *grant, bargain and sell*, in a deed of *bargain and sale* of an estate in fee simple, inrolled in the Register Office, implied covenants for the quiet enjoyment of the lands against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof by the same parties, unless restrained by express words (a). The word *grant*, by virtue of some other Acts of Parliament, also implies covenants for the title (b). But the Act to amend the

Words formerly implying a guarantee of good title.

Give.

Grant.

Exchange.

Partition.

Grant, bargain and sell, in bargain and sale of lands in Yorkshire.

Act to amend the law of real property.

(u) See Williams's Conveyancing Statutes, 98.

(x) *Ante*, p. 540.

(y) See Co. Litt. 384 a, n. (1).

(z) *Bustard's case*, 4 Rep. 121 a.

(a) Stat. 6 Anne, c. 62 (c. 35 in Ruffhead), ss. 30, 34; 8 Geo. II. c. 6, s. 35.

(b) As in conveyances by companies under the Lands Clauses

Covenant
implied in
lease.

law of real property now provides that an exchange or a partition of any tenements or hereditaments made by deed shall not imply any condition in law; and that the word *give* or the word *grant* in a deed shall not imply any covenant in law in respect of any tenements or hereditaments except so far as the word *give* or the word *grant* may by force of any Act of Parliament imply a covenant (c). The mere conveyance of a freehold estate, therefore, does not now imply any covenant for title (d). But if a man grant a lease of land for a term of years, using the word *demise* or equivalent expressions, there will be implied on his part a covenant for quiet enjoyment of the land according to the lease so long as the lessor or any one deriving title from him shall have any estate in the land (e). So that if the lessor's estate should come to an end during the term, without any act or default of his own, as by the death of a tenant for life, the lessee would be without remedy upon such an implied covenant (f). Though if the lessor had no estate at all in the land comprised in the lease, which took effect merely by estoppel (g), the lessee might then sue on the implied covenant in case of his eviction or failure to enter (h). If, however, the lease should contain an express covenant by the lessor for quiet enjoyment, limited to his own acts only, such express covenant, showing clearly what is intended, will nullify the covenant, which would otherwise be implied in law from the word *demise* or other words of

Consolidation Act, 1845, stat. 8 & 9 Vict. c. 18, s. 132; and in conveyances to the Governors of Queen Anne's Bounty, stat. 1 & 2 Vict. c. 20, s. 22.

(c) Stat. 8 & 9 Vict. c. 106, s. 4, repealing 7 & 8 Vict. c. 76, s. 6. The writer is not aware of any Act of Parliament by force of which the word *give* implies a covenant.

(d) See Co. Litt. 384 a, n. (1).

(e) *Spencer's case*, 5 Rep. 17a; Shepp. Touch. 160, 165, 178; Bac. Abr. Covenant (B); *Mostyn v. The West Mostyn Coal & Iron Co.*, 1 C. P. D. 145.

(f) *Adams v. Gibney*, 6 Bing. 656.

(g) *Ante*, p. 468.

(h) *Holder v. Taylor*, Hob. 13; *Style v. Hearing*, Cro. Jac. 78.

lease (i). As has been before mentioned (k), a covenant so limited is all that an intending lessee can require to be inserted in a lease, without special stipulation. This covenant must still be set out at length, as no covenants for title are implied by the Conveyancing Act in a demise at a rent, even though the statutory expressions be used (l).

Some mention should here be made of the Acts which have been passed with a view to the simplification of titles and to facilitate the transfer of land. An Act has been passed "for obtaining a declaration of title" (m). Act for obtaining a declaration of title. This Act empowers persons claiming to be entitled to land in possession for an estate in fee simple, or claiming power to dispose of such an estate, to apply to the Court of Chancery, now represented by the Chancery Division of the High Court, by petition in a summary way for a declaration of title. The title is then investigated by the Court; and if the Court shall be satisfied that such a title is shown as it would have compelled an unwilling purchaser to accept, an order is made establishing the title, subject, however, to appeal as mentioned in the Act. This Act, though seldom resorted to, does not appear to have been repealed. Another Act of the same session is intituled "An Act to facilitate the Proof of Title to and the Conveyance of Real Estates" (n). Act to facilitate the proof of title to and conveyance of real estates. This Act established an office of land registry, and contained provisions for the official investigation of titles, and for the registration of such as appeared to be good and marketable. It has, however, now been superseded by the Land Transfer Act, 1875 (o), which provides (p) The Land Transfer Act, 1875. that after the commencement of that Act, which took place on the 1st of January, 1876 (q), application for the registration of an estate under the former Act shall not

(i) *Noke's case*, 4 Rep. 80 b.

(k) *Ante*, p. 470, n. (s).

(l) *Ante*, p. 562.

(m) Stat. 25 & 26 Vict. c. 67.

(n) Stat. 25 & 26 Vict. c. 58.

(o) Stat. 38 & 39 Vict. c. 87.

(p) Sect. 125.

(q) Sect. 8.

be entertained. For the provisions of this Act reference should be made to the Act itself. Registration under this Act is optional, and its success has not been sufficient to justify any lengthened account of it in an elementary work like the present. When land is once registered under this Act, it ceases, if situate in Middlesex or Yorkshire, to be subject to the county registry of deeds (r).

Such is a very brief and exceedingly imperfect outline of the methods adopted in this country for rendering secure the enjoyment of real property when sold or mortgaged. It may perhaps serve to prepare the student for the course of study which still lies before him in this direction. The valuable treatises of Lord St. Leonards and of Mr. Dart on the law of vendors and purchasers of estates will be found to afford nearly all the practical information necessary on this branch of the law. The title to purely personal property depends on other principles, for an explanation of which the reader is referred to the author's treatise on the principles of the law of personal property. From what has already been said, the reader will perceive that the law of England has two different systems of rules for regulating the enjoyment and transfer of property; that the laws of real estate, though venerable for their antiquity, are in the same degree ill adapted to the requirements of modern society: whilst the laws of personal property, being of more recent origin, are proportionably suited to modern times. Over them both has arisen the jurisdiction of the Court of Chancery, by means of which the ancient strictness and simplicity of our real property laws have been in a measure rendered subservient to the arrangements and modifications of ownership, which the various necessities of society have

required. Added to this have been continual enactments, especially of late years, by which many of the most glaring evils have been remedied, but by which, at the same time, the symmetry of the laws of real property has been greatly impaired. Those laws cannot indeed be now said to form a system; their present state is certainly not that in which they can remain. For the future, perhaps, the wisest course to be followed would be to aim as far as possible at a uniformity of system in the laws of both kinds of property; and, for this purpose, rather to take the laws of personal estate as the model to which the laws of real estate should be made to conform, than on the one hand to preserve untouched all the ancient rules, because they once were useful, or on the other, to be annually plucking off, by parliamentary enactments, the fruit which such rules must, until eradicated, necessarily, produce.

PART VI.

OF THE PRESENT FORM OF A CONVEYANCE.

THE reader is now in a position to understand all the clauses usual in an ordinary deed of conveyance upon sale. Since the commencement of the Conveyancing Act of 1881 (*a*), the usual form of such a deed has undergone a great change, several clauses, which were previously inserted at length, being now omitted in reliance on provisions of that Act. But it is impossible to understand the changes in practice, which the Act has caused, without some acquaintance with the kind of deed previously in use. We will therefore begin by considering the form of the conveyance requisite before the year 1882 to complete a simple transaction of sale of a piece of land by a vendor, who purchased it himself (*b*), and is entitled thereto for an unincumbered estate in fee simple. For convenience of examination each clause is printed in a separate paragraph.

Date.	"THIS INDENTURE (<i>c</i>) made the 31st day of December 1881
Parties.	"BETWEEN A. B. of Cheapside in the city of London esquire of the one part and C. D. of Lincoln's Inn in the county of Middlesex esquire of the other part
Recital.	"WHEREAS the said A. B. has agreed with the said C. D. for the sale to him of the fee simple in posses-

(*a*) Stat. 44 & 45 Vict. c. 41, which commenced immediately after the 31st Dec 1881.

(*b*) *Ante*, p. 559.

(*c*) *Ante*, p. 147.

"sion free from incumbrances of the hereditaments
"hereinafter expressed to be hereby granted

"NOW THIS INDENTURE WITNESSETH that in pursu- Testatum.
"ance of the said agreement and in consideration (d) of Consideration.
"the sum of one thousand pounds upon the execution
"of these presents paid by the said C. D. to the said
"A. B. (the receipt of which sum the said A. B. doth Receipt.
"hereby acknowledge) the said A. B. doth hereby Operative
"grant (e) unto the said C. D. and his heirs words.

"ALL THAT messuage or tenement [*insert descrip-* Parcels.
"*tion of the property*]

"TOGETHER WITH all buildings fixtures lights com- General
"mons fences ways waters watercourses easements and words.
"appurtenances whatsoever to the said hereditaments
"or any of them appertaining or with the same or any
"of them now or heretofore enjoyed or reputed as part
"thereof or appurtenant thereto (f)

"AND ALL THE ESTATE right title interest claim and Estate clause.
"demand of the said A. B. in to and upon the said
"premises

"TO HAVE AND TO HOLD the said premises herein- Habendum.
"before expressed to be hereby granted UNTO AND TO To the use of
"THE USE (g) of the said C. D. his heirs and assigns for the purchaser.
"ever (h) In fee simple.

"AND THE SAID A. B. doth hereby for himself his Covenants
"heirs executors and administrators covenant with the for title:
"said C. D. his heirs and assigns (i)

"THAT notwithstanding anything by him the said 1. For right
"A. B. (k) done omitted or knowingly suffered he now to convey.
"hath power to grant the said premises hereinbefore
"expressed to be hereby granted to the use of the said
"C. D. his heirs and assigns

"AND THAT the same premises shall at all times 2. For quiet
"enjoyment.

(d) *Ante*, pp. 174, 194.

(e) *Ante*, pp. 192, 198.

(f) *Ante*, p. 892.

(g) *Ante*, p. 194.

(h) *Ante*, pp. 140—142, 193.

As to omitting any declaration to
bar dower, see p. 299.

(i) *Ante*, p. 559.

(k) A. B. covenants against his
own acts only. *Ante*, p. 559.

"remain and be to the use of the said C. D. his heirs
 "and assigns and be quietly entered into and upon and
 "held and enjoyed and the rents and profits thereof
 "received by him and them accordingly without any
 "interruption or disturbance by the said A. B. or any
 "person claiming through or in trust for him

3. Free from
 incumbrances.

"AND THAT (l) free and discharged from or otherwise
 "by him the said A. B. his heirs executors or adminis-
 "trators sufficiently indemnified against all estates in-
 "cumbrances claims and demands created occasioned
 "or made by him or any person claiming through or in
 "trust for him

4. For further
 assurance.

"AND FURTHER that he and every person having or
 "claiming any estate or interest in the said premises
 "through or in trust for him will at all times at the cost
 "of the person or persons requiring the same execute
 "and do every such assurance and thing for the further
 "or more perfectly assuring all or any of the said pre-
 "mises to the use of the said C. D. his heirs and assigns
 "as by him or them shall be reasonably required.

"IN WITNESS whereof the said parties to these pre-
 "sents have hereunto set their hands and seals the day
 "and year first above written."

Two witnesses
 desirable.

To the foot of the deed are appended the seals and
 signatures of the parties (m); and, on the back is
 endorsed an attestation by the witnesses, of whom it
 is very desirable that there should be two, though the
 deed would not be void even without any (n). And
 before 1882 it was the practice also to indorse on the
 back of the deed a further receipt for the purchase-
 money (o). On the face of the deed are impressed the
 proper stamps (p). And if the land conveyed should

Stamps

(l) The word *that* is here a
 pronoun

(m) *Ante*, p. 149.

(n) 2 Black. Comm. 307, 378.

(o) This practice is of com-
 paratively modern date. See 2

Atkyns, 478; 3 Atk. 112; 2
 Sand. Uses, 805, n. A. (118, n.,
 5th ed.); 3 Preston's Abstracts,
 15.

(p) Unstamped or insufficiently
 stamped instruments shall not,

be situate in Middlesex or Yorkshire, a memorandum of the exact time of registration of a memorial of the conveyance (*pp*) is indorsed thereon, with the proper reference to the book and page of the register, where the entry is to be found. Indorsement of memorandum of registration.

From the specimen before him, the reader will be struck with the stiff and formal style which characterizes legal instruments; but the formality to be found in every properly drawn deed has the advantage, that the reader who is acquainted with the usual order knows at once where to find any particular portion of the contents; and in matters of intricacy, which must frequently occur, this facility of reference is of incalculable value. The framework of every deed consists but of one, two, or three simple sentences, according to the number of times that the *testatum*, or witnessing part, "Now this Indenture witnesseth," is repeated. Formal style of legal instruments.

This *testatum* is always written in large letters; and, Testatum.

except in criminal proceedings, be given in evidence or be available for any purpose whatever: but such instruments may, as a rule, be received in evidence on payment of the proper duty and the appointed penalty; see stat. 54 & 55 Vict. c. 39, ss. 14, 15, replacing 33 & 34 Vict. c. 97, ss. 15—17, and 17 & 18 Vict. c. 125, ss. 28, 29. Conveyances on sale are now subject to *ad valorem* stamps of one-half per cent., or five shillings per fifty pounds on the amount or value of the consideration for the sale, according to the table below.

Where the amount or value of the consideration for the sale does not exceed £5				£0	0	6
Exceeds	£5	and does not exceed	£10	0	1	0
"	10	"	15	0	1	6
"	15	"	20	0	2	0
"	20	"	25	0	2	6
"	25	"	50	0	5	0
"	50	"	75	0	7	6
"	75	"	100	0	10	0
"	100	"	125	0	12	6
"	125	"	150	0	15	0
"	150	"	175	0	17	6
"	175	"	200	1	0	0
"	200	"	225	1	2	6
"	225	"	250	1	5	0
"	250	"	275	1	7	6
"	275	"	300	1	10	0
"	300	"				

For every £50, and also for any fractional part of £50, of such amount or value..... 0 5 0

See stat. 54 & 55 Vict. c. 39 (The Stamp Act, 1891), ss. 1, 54—61. and First Schedule, replacing 33 & 34 Vict. c. 97. (*pp*) *Ante*, p. 196.

although there is no limit to its repetition (if circumstances should require it), yet in the majority of cases, it occurs but once or twice at most. In the example above given, it will be seen that the sentence on which the deed is framed is as follows:—“This Indenture, “made on such a day between such parties, witnesseth, “that for so much money A. B. doth grant certain premises unto and to the use of C. D. and his heirs.” After the names of the parties have been given, an interruption occurs for the purpose of introducing the recital; and when the whole of the introductory circumstances have been mentioned, the thread is resumed, and the deed proceeds, “Now this Indenture witnesseth.” The receipt for the purchase-money is again a parenthesis; and soon after comes the description of the property, which further impedes the progress of the sentence, till it is taken up in the *habendum*, “To have and to hold,” from which it uninterruptedly proceeds to the end. The contents of deeds, embracing as they do all manner of transactions between man and man, must necessarily be infinitely varied, and a simple conveyance, such as that we have given, is rare, compared with the number of those in which special circumstances occur. But in all deeds, as nearly as possible, the same order is preserved. The names of all the parties are invariably placed at the beginning: then follow recitals of facts relevant to the matter in hand; then a preliminary recital, stating shortly what is to be done; then, the *testatum*, containing the *operative words* of the deed, or the words which effect the transaction, of which the deed is the witness or evidence; after this, if the deed relate to property, come the *parcels* or description of the property, either at large, or by reference to some deed already recited; then, the *habendum* showing the estate to be holden; then, the *uses* and *trusts*, if any; and, lastly, such qualifying provisos and covenants, as may be required by the special circumstances of the

Habendum.

**Parties.
Recitals.**

**Operative
words**

Parcels.

**Habendum.
Uses and
trusts.
Covenants.**

case. Throughout all this, not a single stop is to be found, and the sentences are so framed as to be independent of their aid; for, no one would wish the title to his estates to depend on the insertion of a comma or semicolon. The commencement of sentences, and now and then some few important words, which serve as landmarks, are rendered conspicuous by capitals: by the aid of these the practised eye at once collects the sense; whilst, at the same time, the absence of stops renders it next to impossible materially to alter the meaning of a deed without the forgery being discovered.

If the reader will turn to Appendix (A), he will observe that the frame of the precedent given above is the same as that of the old release; although in the former the clauses conveying the reversion, &c., and the title deeds are omitted as unnecessary (*q*), as well as the covenant that the vendor is seised in fee (*r*), and in the latter the conveyance is made to the old uses to bar dower (*s*), and not simply to the purchaser in fee. But though the chief clauses of the modern deed of grant are in substance the same as those of the earlier release, it will be observed that in the above precedent no attempt is made to rival its elaborate superfluity of expression. The extreme luxuriance of language by which legal instruments were distinguished (*t*) was in a great measure the outcome of the faulty system of remuneration formerly employed for conveyancing work. The labour of a lawyer is very different from that of a copyist or printer; it consists first and chiefly in acquiring a minute acquaintance with the principles

(*q*) Title deeds pass on a conveyance of the land, to which they relate, without being expressly mentioned; *Harrington v. Price*, 8 B. & Ad. 170.

(*r*) *Ante*, p. 559.

(*s*) *Ante*, p. 359.

(*t*) The extravagant verbosity of conveyancing forms appears to date from the latter part of the sixteenth century; see the books mentioned in Davidson's *Prec. Conv.* Vol. I, pp. 7—12, 5th ed.

Common
forms.

of the law, then in obtaining a knowledge of the facts of any particular case which may be brought before him, and lastly, in practically applying to such case the principles he has previously learnt. But, for the last and least of these items alone did conveyancers obtain any direct remuneration; for deeds were paid for by the length, like printing or copying, without any regard to the principles they involved, or to the intricacy or importance of the facts to which they might relate (*u*); and, more than this, the rate of payment was fixed so low, that no man of education could afford for the sake of it, first to ascertain what sort of instrument the circumstances might require, and then to draw a deed containing the full measure of ideas of which words are capable (*x*). The consequence of this false economy on the part of the public was that certain well known and long established lengthy forms, full of synonyms and expletives, were current among lawyers as *common forms*, and, by the aid of these, ideas were diluted to the proper remunerating strength; not that lawyers actually inserted nonsense simply for the sake of increasing their fees; but words, sometimes unnecessary in any case, sometimes only in the particular case in which they were engaged, were suffered to remain, sanctioned by the authority of time and usage. The proper amount of verbiage to a common form became well established and understood; and whilst any

(*u*) By stat. 6 & 7 Vict. c. 78, s. 37, the charges of a solicitor for business relating entirely to conveyancing were rendered liable to *taxation* or reduction to the established scale, which was then regulated only by length. Previously to this statute, the bill of a solicitor relating to conveyancing was not taxable, unless part of the bill was for business transacted in some Court of law or equity; Beames on Costs, 176, 177, 2nd ed. (1840). But although con-

veyancing bills were not strictly taxable, they were always drawn up on the same principle of payment by length, which pervaded the other branches of the law.

(*x*) When conveyancing bills became taxable, the payment to a solicitor for drawing a deed was fixed at one shilling for every seventy-two words, denominated a *folio*; Richards's Book of Costs (1844), pp. 408—411; and the fees of counsel, though paid in guineas, averaged about the same.

attempt to exceed it was looked on as disgraceful, for a long time it was not materially diminished. In the present century, however, the art of conveyancing did not escape the influence of the spirit of reform, which gave rise to the real property legislation of 1833 (*y*), 1845 (*z*) and 1859–60 (*a*). The exuberant verbiage of the old common forms was gradually weeded out; and after the introduction of the conveyance of land by simple grant (*b*), there was an increasing tendency on the part of conveyancers to eradicate superfluous words from their precedents. The old system of remuneration for conveyancing work remained substantially the same until 1881 (*c*). Since that year the remuneration of solicitors for conveyancing and other non-contentious business has been regulated upon new principles by the general order made under the Solicitors' Remuneration Act, 1881 (*d*). Under the influence of the present

Solicitors' Remuneration Act, 1881, and order thereunder.

(*y*) *Ante*, pp. 98, 94, 204, 284, 298, 532.

(*z*) *Ante*, pp. 192, 341, 496.

(*a*) *Ante*, pp. 475, 476, 513.

(*b*) *Ante*, p. 192.

(*c*) By stat. 33 & 34 Vict. c. 28, ss. 4–15, 18, the remuneration of solicitors was first authorized to be fixed by agreement between themselves and their clients, and the officers taxing solicitors' costs were permitted to have regard to the skill, labour and responsibility involved.

(*d*) Stat. 44 & 45 Vict. c. 44, ss. 1–7. By this order, the remuneration of solicitors in respect of business connected with sales, purchases and mortgages completed, and with leases and agreements for leases (other than mining or building leases), and conveyances reserving rent, or agreements for the same, when the transaction shall have been completed, is to be that prescribed in Schedule I. to the order. In respect of all other conveyancing and non-contentious business the remuneration is to be regulated

according to the previous system as altered by Schedule II. Schedule I. contains scales of charges adjusted upon the principle of a commission or percentage upon the amount of the purchase or mortgage money, or the rent reserved. Schedule II. prescribes such fees for instructions for deeds, wills, and other documents as may be fair and reasonable, raises the allowance for drawing such documents to 2s. per folio, and specifies certain other charges. The charges specified in Schedule II. may be increased or diminished in extraordinary cases for special reasons. In all cases to which the scales prescribed in Schedule I. apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the previous system as altered by Schedule II.; but if no such election is made, his remuneration will be according to the scale prescribed by Schedule I.; see *Hester v. Hester*, 34 Ch. D. 607.

Remuneration by commission or percentage.

system of remuneration and of the changes in practice caused by the operation of the Conveyancing Act of 1881, all unnecessary clauses and expressions are now generally excluded from deeds. It must not be supposed, however, that legal instruments are now drawn without regard to precedent, or are altogether destitute of lengthy clauses. When parties desire to provide exhaustively for several possible events, as often occurs in the case of settlements and wills, it is rarely possible to be concise without the risk of inaccuracy. In such cases, the clauses inserted are frequently based upon the old common forms, the best of which, though prolix, were marvellously accurate. And in all drafting due regard should always be had to the established forms, which have stood the test of long usage, and to which generations of conveyancers have contributed their skill and learning.

Conveyance made after the 31st December, 1881.

But to return to our practical illustration of the conveyancer's craft; — Let us now suppose that a simple transaction of sale of land exactly similar to those, to which the deeds given above and in Appendix (A) relate, is to be completed at the present time. In drawing our conveyance, we may then rely on the following provisions of the Conveyancing Act of 1881 (*e*), which apply only to conveyances made after the 31st of December, 1881 (*f*):

Conveyance of land passes advantages in the nature of easements enjoyed with the land at the time of conveyance.

(Section 6, sub-sect. 1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, apper-

Agreement as to remuneration.

Under the same Act of 1881 (sect. 8), it is competent for a solicitor and his client to enter into an agreement, which must be in writing signed by the person to be bound thereby, or by his agent in that behalf, for the re-

muneration of the solicitor, to such amount and in such manner as they may think fit, for any business to which the Act relates.

(*e*) Stat. 44 & 45 Vict. c. 41.

(*f*) Sects. 6 (sub-s. 8), 7, (sub-s. 8), 68 (sub-s. 8).

taining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof (g).

(Section 6, sub-sect. 2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof (h).

(Section 63, sub-sect. 1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same (i).

Sections 6 and 63 apply only if and as far as a contrary intention is not expressed in the conveyance, and have effect subject to the terms of the conveyance and to the provisions therein contained (k).

(Section 7, sub-sect. 1.) In a conveyance there shall, *in the several cases in this section mentioned*, be deemed to be included, and there shall *in those several cases*, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person [or by each person] who conveys, as far as regards the subject-matter or share of subject-matter *expressed to be conveyed by him*, with the person, if one, to whom the conveyance is made, [or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common,] that is to say :

(A) *In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner* (namely) (l) :

That, notwithstanding anything by the person who so conveys, for right to convey;

(g) See Williams's Conveyancing Statutes, 60—69, 78.

(h) See Williams's Conveyancing Statutes, 70, 78.

(i) See Williams's Conveyancing

Statutes, 242—244.

(k) Sect. 6 (sub-s. 4), 63, (sub-s. 2).

(l) For covenants implied in other cases, see *ante*, pp. 561, 562.

[or any one through whom he derives title, otherwise than by purchase for value,] made, done, executed or omitted, or knowingly suffered, the person who so conveys, has, [with the concurrence of every other person, if any, conveying by his direction,] full power to convey the subject-matter expressed to be conveyed, [subject as, if so expressed, and] in the manner in which, it is expressed to be conveyed;

for quiet enjoyment; and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys [or any person conveying by his direction,] or rightfully claiming or to claim by, through, under or in trust for the person who so conveys, [or any person conveying by his direction, or by, through or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value];

free from incumbrances; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims and demands [other than those subject to which the conveyance is expressly made,] as either before or after the date of the conveyance have been or shall be made, occasioned or suffered by that person [or by any person conveying by his direction,] or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, [or by, through or under any person conveying by his direction, or by, through or under any one through whom the person who so conveys derives title, otherwise than by purchase for value];

and for further assurance, and further, that the person who so conveys, [and any person conveying by his direction,] and every other person having, or rightfully claiming any estate or interest in the subject-matter of conveyance, [other than an estate or interest subject whereto the conveyance is expressly made,] by, through, under, or in trust for the person who so conveys, [or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title otherwise than by purchase by value,] will from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the

conveyance to the person to whom the conveyance is made, and to those deriving title under him, [subject as, if so expressed, and] in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) (*m*).

In considering the above enactments, regard must be had to the following provisions of the interpretation clause of the Act :

Sect. 2 (ii.) Land, unless a contrary intention appears, includes Interpretation
land of any tenure, and tenements and hereditaments, corporeal of terms.
or incorporeal, and houses and other buildings, also an undivided
share in land :

(v.) Conveyance, unless a contrary intention appears (*n*), includes assignment, appointment, lease, settlement or other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property ; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance.

The reader will remember that, before the 6th section Reason for
of the above Act came into operation, it was unneces- use of *general*
sary on a conveyance of land expressly to grant rights words.
legally appurtenant thereto, although the practice was to include such rights in the *general words* (*o*) ; and that the only real use of *general words* in a conveyance was to grant, as rights or easements, advantages used in connection with the land conveyed as a matter of fact, without being rights legally appurtenant thereto (*p*). For example, suppose that a man has two plots of land, plot A. and plot B., and is accustomed to use for the benefit of plot A. an artificial watercourse carried

(*m*) See Williams's Conveyancing Statutes, 74—82. The words enclosed within brackets [] are those which are not material to the conveyance we are about to consider.

(*n*) See sect. 7, sub-s. 5, *ante*,

p. 562.

(*o*) See *ante*, pp. 391, 392.

(*p*) *Ante*, pp. 391, 392 ; see Williams's Conveyancing Statutes, 65 ; Williams on Commons, 168—170.

over plot B., or a road over plot B. These advantages cannot be rights or easements appurtenant to plot A., for they are exercised over plot B.; and no man can have an easement over his own land. But if plot A. were to be sold alone and conveyed to a purchaser "together with all watercourses, ways and advantages therewith used and enjoyed," these words would operate to grant, as rights or easements, the advantages, in the nature of easements, at the time of conveyance as a matter of fact used over plot B. for the benefit of plot A., although the same never previously existed as of right or as legal easements (*q*). After removing from the 6th section of the Conveyancing Act all words, which add nothing to the law (*r*), we find this fact remaining, that by virtue of the Act a conveyance of land now operates to convey all advantages *enjoyed with* the land at the time of conveyance. Having regard to this fact and to the established effect of similar expressions in the case of the old general words, it is considered that the object formerly sought to be effected by the insertion of *general words* in a conveyance, will now be attained by the operation of the enactment in question. It will be observed that the above section only operates to convey advantages enjoyed with the land conveyed *at the time of conveyance*. Apparently it would not extend to grant, as rights, advantages enjoyed with the land conveyed at some previous time, but not proved to have been so enjoyed at the time of conveyance (*s*).

Estate clause. The *estate clause* (*t*) was a relic of the old release, and was much more appropriate to the conveyance of

(*q*) *Watts v. Kelson*, L. R., 6 Ch. 166; *Kay v. Ozley*, L. R., 10 Q. B. 380; *Barkshire v. Grubb*, 18 Ch. D. 616; see Williams's Conveyancing Statutes, 65; Williams on Commons, 315—319,

28.

(*r*) See Williams's Conveyancing Statutes, 61 *et seq.*

(*s*) See Williams's Conveyancing Statutes, 68, 69.

(*t*) *Ante*, p. 569.

land by lease and release than to a direct grant (*u*). It was nevertheless the practice, after the introduction of conveyance by grant, to insert an estate clause in almost every instrument of alienation, where the entire interest of the conveying parties was transferred, on the alleged ground, that it was necessary to pass any outstanding particular estate or interest which might happen to be vested in any of the conveying parties, distinct from the estate or interest which such party purported to convey. It was admitted, however, that no such ground did exist, and that the clause was wholly unnecessary (*x*). Indeed, it was practically without effect; for it was held to be subservient to the intention of the parties as gathered from the terms of the conveyance (*y*). The enactment of the 63rd section of the Conveyancing Act (*z*) has removed every semblance of necessity for the use of an estate clause, which has at last been abandoned in practice. As the application of this section is declared to be subject to the intention of the parties as expressed in the conveyance (*a*), it does not appear necessary expressly to exclude its operation in conveyances, such as leases (*b*), under which the whole estate of the conveying party is *not* intended to pass.

Reason for
use of *estate*
clause.

We now come to consider the incorporation into our conveyance of the statutory covenants for title. According to our supposition, A. B., the vendor, purchased himself the land he is about to convey. He will, therefore, covenant as to his own acts only (*c*). If we turn to section 7, sub-sect. 1 (A), of the Conveyancing Act, 1881 (*d*), which is set out above (*e*), we may extract

Statutory
covenants
for title.

(*u*) *Ante*, pp. 151, 186—192.
(*x*) Davidson's *Prec. Conv.*, vol. i, p. 94, 4th ed.
(*y*) *Hunt v. Remnant*, 9 Ex. 685; *Hooper v. Harrison*, 2 K. & J. 118; *Neame v. Moorwin*, L. R., 8 Eq. 91; *Francis v. Minton*, L. R., 2 C. P. 548.

(*z*) *Ante*, p. 577.
(*a*) Stat. 44 & 45 Vict. c. 41, s. 63, sub-s. 2; *ante*, p. 577.
(*b*) See sect. 2 (v.); *ante*, p. 579.
(*c*) *Ante*, pp. 559, 569.
(*d*) Stat. 44 & 45 Vict. c. 41.
(*e*) *Ante*, p. 577.

therefrom covenants for title suited to our present requirements. As this enactment is contained in a very intricate sentence, so much of it as is unnecessary for our present purpose has been enclosed within brackets. The words enclosed within brackets do not apply to the transaction we are now considering for the following reasons:—Our conveyance is to be made by one person only to one person only, and not to joint tenants or tenants in common; A. B., the person conveying, purchased the land himself, and, therefore, he does not “derive title through any one otherwise than by purchase for value;” there is no one concurring in the conveyance by the direction of A. B.; and the conveyance is not expressly made subject to any estate, interest or incumbrance. If the above enactment be read straight through, leaving out the words within brackets, its provisions will be found to correspond with the terms of the covenants for title in the form of conveyance given above (*f*). The conditions to be fulfilled in order that the required covenants may be “deemed to be included” in our conveyance, and implied by law upon the execution thereof, appear to be (1) that the conveyance must be a conveyance for valuable consideration other than a mortgage (*g*), and (2) that the person intended to be bound by the implied covenants must convey and be expressed to convey as beneficial owner (*h*). The statutory covenants for title are, however, expressed in language so complicated and ungainly, that the draftsman may well hesitate to adopt them. Indeed beside the involved utterance of the statute, the old common form of covenants for title (*i*) appears lucid and mellifluous, and the later form (*k*)

(*f*) *Ante*, p. 589.

(*g*) Different covenants are implied by the use of the words as *beneficial owner* in different conveyances; e. g., in a mortgage absolute covenants for title are thereby implied. See sect. 7,

sub-sect. 1 (A), (B), (C), (D); *ante*, p. 581.

(*h*) Sect. 7, sub-sects. 1 (A), 4; *ante*, pp. 561, 562.

(*i*) See Appendix (A).

(*k*) *Ante*, p. 589.

terse. But the fact is that the guarantee given by covenants for title is little valued and rarely resorted to. The real security of a purchaser lies in the investigation of title (*l*). If the required guarantee is substantially furnished by the incorporation of the statutory covenants, as appears to be the case, the convenience of reducing the length of the deed may be allowed to prevail over the objection to their form. We will therefore rely upon the statute for the covenants for title, taking care to use the proper statutory words, without which the necessary covenants by the vendor would not be implied (*m*). Our conveyance will then take the following form, the nature of the transaction being indicated in the *Testatum* instead of by recital:

"THIS INDENTURE made the first day of January Datr.
"1882

"BETWEEN A. B. of Cheapside in the City of London Parties.
"Esquire of the one part and C. D. of Lincoln's Inn in
"the County of Middlesex Esquire of the other part

"WITNESSETH that in consideration (*n*) of the sum of *Testatum*.
"one thousand pounds paid by the said C. D. to the said *Consideration*.
"A. B. for the purchase of the fee simple in possession *Nature of*
"of the hereditaments hereinafter described (the receipt *transaction*
"of which sum the said A. B. doth hereby acknowledge) *Receipt*.
"the said A. B. as *beneficial owner* (*o*) doth hereby *Operative*
"grant (*p*) unto the said C. D. *words*.

"ALL THAT messuage or tenement [*insert description* *Parcels*.
"of the property]

"TO HAVE AND TO HOLD the same premises unto and *Habendum*.
"TO THE USE (*q*) of the said C. D. in fee simple (*r*)

"IN WITNESS, &c." (*s*).

(*l*) *Ante*, pp. 541 *et seq.*
(*m*) Stat. 44 & 45 Vict. c. 41,
s. 7, sub-s. 4; *ante*, p. 562.
(*n*) *Ante*, p. 194.
(*o*) *Ante*, pp. 577, 552.

(*p*) *Ante*, pp. 192, 198.
(*q*) *Ante*, p. 194.
(*r*) *Ante*, p. 198.
(*s*) *Ante*, p. 570.

Receipt.

It is no longer usual to indorse a receipt for consideration upon a deed; for it is provided by the Conveyancing Act of 1881 (*t*) that a receipt for consideration money or securities in the body of a deed executed after the year 1881 shall be a sufficient discharge, and that such a receipt, *or* an indorsed receipt, shall, in favour of a subsequent purchaser, be sufficient evidence of the payment or giving of the whole amount of the consideration.

The above form of conveyance is certainly shorter than that previously given (*u*); and similar forms are now generally adopted in practice. But it can hardly be said that the rights and obligations of the parties to a conveyance may be determined with increased accuracy or simplicity by a deed relying on the provisions of the Conveyancing and Law of Property Act, 1881 (*x*). The student, when he proceeds to practice drafting, should never forget that a deed is not an end in itself, but is only a means for ascertaining the rights and obligations of the parties thereto. His object should be to define those rights and obligations clearly and accurately, rather than briefly or even concisely. It is of course unnecessary that he should express what is clearly implied by law; but not the least important part of his task is to satisfy himself that the law clearly defines those rights and obligations for which he omits to provide.

(*t*) Stat. 44 & 45 Vict. c. 41, ss. 54, 55; see Williams's Conveyancing Statutes, 227—230. The absence of an indorsed receipt was formerly regarded as a suspicious circumstance.

(*u*) *Ante*, p. 568.

(*x*) Stat. 44 & 45 Vict. c. 41. It is beyond the scope of the

present Work to consider the provisions of this Act with reference to conveyances more complicated than the above. As to the effect of this Act, generally, upon the previous law and practice, the reader is referred to the Editor's "Conveyancing Statutes."

APPENDIX (A.)

Referred to, pp. 192, 380, 573, 583

Bargain and Sale, or Lease for a Year. (See p. 190.)

THIS INDENTURE made the first day of January (a) [in the Date. third year of our Sovereign Lady Queen Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and] in the year of our Lord 1840

BETWEEN A. B. of Cheapside in the city of London Esquire Parties. of the one part and C. D. of Lincoln's Inn in the county of Middlesex Esquire of the other part

WITNESSETH that the said A. B. in consideration of five Testatum. shillings (b) of lawful money of Great Britain to him in Consideration. hand paid by the said C. D. at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) HATH bargained and sold and by these Bargain and presents DOTH bargain and sell unto the said C. D. his sale. executors administrators and assigns

ALL that messuage or tenement situate lying and being Parcels. at &c. and commonly called or known by the name of &c. [here describe the premises]

TOGETHER with all and singular the houses outhouses General edifices buildings barns dovehouses stables yards gardens words. orchards lights easements ways paths passages waters watercourses trees woods underwoods commons and commonable rights hedges ditches fences liberties privileges emoluments commodities advantages hereditaments and appurtenances whatsoever to the said messuage or tenement lands and hereditaments or any part thereof belonging or

(a) The words within brackets were latterly omitted.

(b) *Ante*, pp. 182, 191.

in anywise appertaining or with the same or any part thereof now or at any time heretofore usually held used occupied or enjoyed [or accepted reputed taken or known as part parcel or member thereof] And the reversion and reversions remainder and remainders yearly and other rents issues and profits of the same premises and every part thereof

Habendum.

TO HAVE AND TO HOLD the said messuage or tenement lands and hereditaments and all and singular other the premises hereinbefore bargained and sold or intended so to be with their and every of their rights members and appurtenances unto the said C. D. his executors administrators and assigns from the day next before the day of the date of these presents for and during and until the full end and term of one whole year thence next ensuing and fully to be complete and ended.

Reddendum.

YIELDING AND PAYING therefor the rent of one peppercorn (c) at the expiration of the said term if the same shall be lawfully demanded

To the intent and purpose that by virtue of these presents and of the statute for transferring uses into possession the said C. D. may be in the actual possession of the same premises and may thereby be enabled to accept and take a grant and release of the freehold reversion and inheritance of the same premises and of every part and parcel thereof to the said C. D. his heirs and assigns to the uses and for the intents and purposes to be declared by another indenture of three parts already prepared and intended to be dated the day next after the day of the date hereof

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

The Release.

Date.

THIS INDENTURE made the second day of January (d) [in the third year of the reign of our Sovereign Lady Queen

(c) *Ante*, p. 306.

(d) The words within brackets were latterly omitted.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and] in the year of our Lord 1840

BETWEEN A. B. of Cheapside in the city of London *Parties.*
Esquire of the first part C. D. of Lincoln's Inn in the county of Middlesex Esquire of the second part and Y. Z. of Lincoln's Inn aforesaid gentleman of the third part (e)

WHEREAS by indentures of lease and release bearing date respectively on or about the first and second days of January 1838 and respectively made or expressed to be made between E. F. therein described of the one part and the said A. B. of the other part for the consideration therein mentioned the messuage or tenement lands and hereditaments hereinafter described and intended to be hereby granted with the appurtenances were conveyed and assured by the said E. F. unto and to the use of the said A. B. his heirs and assigns for ever *Recital of the conveyance to the vendor.*

AND WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him of the inheritance in fee simple in possession of and in the said messuage or tenement lands and hereditaments hereinbefore referred to and hereinafter described with the appurtenances free from all incumbrances at or for the price or sum of one thousand pounds *Recital of the contract for sale.*

NOW THIS INDENTURE WITNESSETH that for carrying the said contract for sale into effect and in consideration of the sum of one thousand pounds of lawful money of Great Britain to the said A. B. in hand well and truly paid by the said C. D. upon or immediately before the sealing and delivery of these presents (the receipt of which said sum of one thousand pounds in full for the absolute purchase of the inheritance in fee simple in possession of and in the messuage or tenement lands and hereditaments hereinafter described and intended to be hereby granted and released *Testatum.*
Consideration.
Receipt.

(e) The reason why Y. Z. is made a party to this deed is, that the widow of C. D., if married on or before the 1st of January, 1834, may be barred or deprived of her dower. See *ante*, pp. 359, 360.

If this should not be intended, the deed would be made between A. B. of the one part, and C. D. of the other part, as in the deed given, *ante*, p. 588.

Operative
words.

with the appurtenances he the said A. B. doth hereby acknowledge and of and from the same and every part thereof doth acquit release and discharge the said C. D. his heirs executors administrators and assigns [and every of them for ever by these presents]) He the said A. B. HATH granted bargained sold aliened released and confirmed and by these presents DOTH grant bargain sell alien release and confirm unto the said C. D. (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said A. B. in consideration of five shillings in and by an indenture bearing date the day next before the day of the date of these presents for the term of one whole year commencing from the day next before the day of the date of the same indenture of bargain and sale and by force of the statute made for transferring uses into possession) and to his heirs (f)

Parcels.

ALL that messuage or tenements situate lying and being at &c. commonly called or known by the name of &c. [*here describe the premises*]

General
words.

TOGETHER with all and singular the houses outhouses edifices buildings barns dovehouses stables yards gardens orchards lights easements ways paths passages waters watercourses trees woods underwoods commons and commonable rights hedges ditches fences liberties privileges emoluments commodities advantages hereditaments and appurtenances whatsoever to the said messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be or any part thereof belonging or in anywise appertaining or with the same or

(f) If the deed were dated at any time between the month of May, 1841 (the date of the statute 4 & 5 Vict. c. 21; *ante*, pp 186, 192), and the first of January, 1845 (the time of the commencement of the operation of the Transfer of Property Act, *ante*, p. 192. n. (e)), the form would be as follows:—"He the said A. B. "DOth by these presents (being "a deed of release made in pursuance of an Act of Parliament

"made and passed in the fourth
"year of the reign of her present
"Majesty Queen Victoria intituled
"An Act for rendering a Release
"as effectual for the Conveyance
"of Freehold Estates as a Lease
"and Release by the same Parties)
"grant bargain sell alien release
"and confirm unto the said C. D.
"and his heirs."

As to the form in a deed of grant, see *ante*, p. 569.

any part thereof now or at any time heretofore (g) usually held used occupied or enjoyed [or accepted reputed taken or known as part parcel or member thereof] And the reversion and reversions remainder and remainders yearly and other rents issues and profits of the same premises and every part thereof

AND all the estate right title interest use trust inheritance Estate. property possession benefit claim and demand whatsoever both at law and in equity of him the said A. B. in to out of or upon the said messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be and every part and parcel of the same with their and every of their appurtenances

AND all deeds evidences and writings relating to the title And all deeds. of the said A. B. to the said hereditaments and premises hereby granted and released or intended so to be now in the custody of the said A. B. or which he can procure without suit at law or in equity

TO HAVE AND TO HOLD the said messuage or tenement Habendum. lands and hereditaments hereinbefore described and all and singular other the premises hereby granted and released or intended so to be with their and every of their rights members and appurtenances unto the said C. D. and his heirs (h)

To such uses upon and for such trusts intents and Uses to bar purposes and with under and subject to such powers dower. provisoes declarations and agreements as the said C. D. shall from time to time by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses direct limit or appoint And in default of and until any such direction limitation or appointment and so far as any such direction limitation or appointment if incomplete shall not extend To the use of the said C. D.

(g) See ante, p. 580.

(h) If C. D. was not married on or before the 1st of January, 1834, or if, having been so married, the dower of his widow should

not be intended to be barred, instead of the next clause, the form would simply be "To the use of the said C. D. his heirs and assigns for ever."

and his assigns for and during the term of his natural life without impeachment of waste And from and after the determination of that estate by forfeiture or otherwise in his lifetime To the use of the said Y. Z. and his heirs during the life of the said C. D. In trust nevertheless for him the said C. D. and his assigns and after the decease of the said C. D. To the use of the said C. D. his heirs and assigns for ever.

Covenants
for title.

AND the said A. B. doth hereby for himself his heirs executors and administrators covenant promise and agree with and to the said C. D. his appointees heirs and assigns in manner following that is to say

That the
vendor is
seised in fee.

THAT for and notwithstanding any act deed matter or thing whatsoever by him the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him made done or committed to the contrary (i) [he the said A. B. is at the time of the sealing and delivery of these presents lawfully rightfully and absolutely seised of or well and sufficiently entitled to the messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be with their appurtenances of and in a good sure perfect lawful absolute and indefeasible estate of inheritance in fee simple without any manner of condition contingent proviso power of revocation or limitation of any new or other use or uses or any other matter restraint cause or thing whatsoever to alter change charge revoke make void lessen or determine the same estate

That the
vendor has a
good right
to convey.

AND THAT for and notwithstanding any such matter or thing as aforesaid [he the said A. B. now hath in himself good right full power and lawful and absolute authority to grant bargain sell alien release and confirm the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances unto the said C. D. and his heirs to the uses and in manner aforesaid and according to the true intent and meaning of these presents

(i) See *ante*, p. 559.

AND THAT the same messuage or tenement lands hereditaments and premises with their appurtenances shall and lawfully may accordingly from time to time and at all times hereafter be held and enjoyed and the rents issues and profits thereof received and taken by the said C. D. his appointees heirs and assigns to and for his and their own absolute use and benefit without any lawful let suit trouble denial hindrance eviction ejection molestation disturbance or interruption whatsoever of from or by the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him

For quiet enjoyment.

AND THAT (*k*) free and clear and freely and clearly acquitted exonerated and discharged or otherwise by him the said A. B. his heirs executors or administrators well and sufficiently saved defended kept harmless and indemnified of from and against all and all manner of former and other [gifts grants bargains sales leases mortgages jointures dowers and all right and title of dower uses trusts wills entails statutes merchant and of the staple recognizances judgments extents executions annuities legacies payments rents and arrears of rent forfeitures re-entries cause and causes of forfeiture and re-entry and of from and against all and singular other] estates rights titles charges and incumbrances whatsoever had made done committed executed or willingly suffered by him the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him

For freedom from incumbrances.

AND MOREOVER that he the said A. B. and his heirs and all and every persons and person having or lawfully claiming or who shall or may have or lawfully claim any estate right title or interest whatsoever at law or in equity in to or out of the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances by from through under or in trust for him or them shall and will from time to time and at all times hereafter upon every reasonable request and at the costs and charges of the said C. D. his

For further assurance.

(*k*) The word *that* is here a pronoun.

appointees heirs and assigns make do and execute or cause or procure to be made done and executed all and every or any such further and other lawful and reasonable acts deeds things grants conveyances and assurances in the law whatsoever for further better more perfectly and effectually granting releasing conveying and assuring the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances unto the said C. D. and his heirs to the use and in manner aforesaid and according to the true intent and meaning of these presents as by him the said C. D. his appointees heirs or assigns or his or their counsel in the law shall or may be reasonably advised or devised and required [so that no such further assurance or assurances contain or imply any further or any other warranty or covenant than against the person or persons who shall make and execute the same and his her or their heirs executors and administrator 'acts and deeds only and so that the person or persons who shall be required to make and execute any such further assurance or assurances be not compelled or compellable for making or doing thereof to go or travel from his her or their dwelling or respective dwellings or usual place or places of abode or residence]

IN WITNESS, &c.

On the back is endorsed the attestation and further receipt as follows :—

Signed sealed and delivered by the within-named A. B. C. D. and Y. Z. in the presence of

John Doe of London Gent.

Richard Roe Clerk to *Mr. Doe*.

Received the day and year first within written	} £1000
of and from the within-named C. D. the sum	
of One Thousand Pounds being the consideration	
within mentioned to be paid by him to me.	

(Signed) A. B.

Witness *John Doe*.

Richard Roe.

APPENDIX (B).

Referred to, p. 204.

THE case of *Muggleton v. Barnett*, was shortly as follows (a): — Edward Muggleton purchased in 1772 certain copyhold property, held of a manor in which the custom was proved to be, that the land descended to the youngest son of the person last seised, if he had more than one; and if no son, to the daughters as parceners; and if no issue, then to the youngest brother of the person last seised, and to the youngest son of such youngest brother. There was, however, no formal record upon the rolls of the Court of the custom of the manor with respect to descents, but the custom was proved by numerous entries of admission. The purchaser died intestate in 1812, leaving two granddaughters, the only children of his only son, who died in his lifetime. One of the granddaughters died intestate and unmarried, and the other died leaving an only son, who died in 1854 without issue, and apparently intestate, and who was the person last seised. On his death the youngest son of the youngest brother of the purchaser brought an ejectment, and the Court of Exchequer, by two against one, decided against him. On appeal, this decision was confirmed by the Court of Exchequer Chamber, by four judges against three. But much as the judges differed amongst themselves as to the extent of the custom amongst collaterals, they appear to have all agreed that the act to amend the law of inheritance had nothing to do with the matter. The act, however, expressly extends to lands descendible according to the custom of borough English or any other custom; and it enacts that in every case descent

(a) The substance of these observations appeared in letters to the editor of the "Jurist" newspaper, 4 Jur., N. S., Part 2, pp. 5, 56.

shall be traced from the purchaser. Under the old law, seisin made the stock of descent. By the new law, the purchaser is substituted *in every case* for the person last seised. The legislature itself has placed this interpretation upon the above enactment. A well-known statute, commonly called the Wills Act (b), enacts, "that it shall be lawful for every person to devise or dispose of by his will, executed in manner hereinafter required, all real estate which he shall be entitled to, either at law or in equity, at the time of his death, *and which, if not so devised or disposed of, would devolve upon the heir at law or customary heir of him, or, if he became entitled by descent, of his ancestor.*" Now the old doctrine of *possessio fratris* was this,—that if a purchaser died seised, leaving a son and daughter by his first wife, and a son by his second wife, and the eldest son entered as heir to his father, the possession of the son made his sister of the whole blood to inherit as his heir, in exclusion of his brother of the half-blood; but if the eldest son did not enter, his brother of the half-blood was entitled *as heir to his father, the purchaser*. This doctrine was abolished by the statute. Descent in every case is to be traced from the purchaser. Let the eldest son enter, and remain ever so long in possession, his brother of the half-blood will now be entitled, on his decease, in preference to his sister of the whole blood, not as his heir, but *as heir to his father* (c).

Let us now take the converse case of a descent according to the custom of borough English, and let the purchaser die intestate, leaving a son by his first wife, and a son and daughter by his second wife. Here it is evident that the youngest son has a right to enter as customary heir. He enters accordingly, and dies intestate, and without issue. Who is the next heir since the statute? Clearly the brother of the half-blood, for he is the *customary heir of the purchaser*. As the common law, which is the general custom

(b) Stat. 7 Will. IV. & 1 Vict.
c. 26, s. 8, *ante*, p. 222.

(c) See Sugden's Real Property

Statutes, pp. 280, 281 (1st ed.);
267, 268 (2nd ed.).

of the realm, was altered by the statute, and a person became entitled to inherit who before had no right, so the custom of borough English, and every other special custom, being expressly comprised in the statute, is in the same manner altered ; and the stock of descent, which was formerly the person last seised, is now, in every case, the purchaser and the purchaser only.

Suppose, therefore, that Edward Muggleton, the purchaser, who died in 1812, had left a son by his first wife, and a son and daughter by his second wife, and that the youngest son, having entered as customary heir, died intestate in 1854,—who would be entitled ? Clearly, the elder son, as customary heir, being of the male sex, in preference to the daughter. Before the act the sister of the whole blood would have inherited, as customary heir to her younger brother, and the elder brother, being of the half-blood to the person last seised, could not have inherited at all ; but since the act the descent is traced from the purchaser ; and the elder brother would, accordingly, be entitled, not as heir to his half-brother, but as heir to his father. The act then breaks in upon the custom. By the custom before the act the land descended to the sister of the person last seised, in default of brothers of the whole blood. By the act the purchaser is substituted for the person last seised, and whoever would be entitled as heir to the purchaser, if he had just died seised, must now be entitled as his heir, however long ago his decease may have taken place.

Let us put another case : Suppose the father of Edward Muggleton, the purchaser, had been living in 1854, when his issue failed. It is clear, that under the act the father would have been entitled to inherit, notwithstanding the custom. Here, again, the custom would have been broken in upon by the act, and a person would have been entitled to inherit who before was not.

Suppose, again, that the father of Edward Muggleton

had been the purchaser, and that Edward Muggleton was his youngest son, and that the estate, instead of being a fee simple, had been an estate tail. Estates tail, it is well known, follow customary modes of descent in the same manner as estates in fee. The purchaser, however, or donee in tail, is and was, both under the new law and under the old, the stock of descent. The Courts appear to have been satisfied that in lineal descents according to the custom the youngest was invariably preferred. It is clear, therefore, that, when the issue of Edward Muggleton failed in 1854, the land would have descended to the plaintiff as youngest son of the next youngest son of the purchaser, although the plaintiff was but the first cousin twice removed of the person last seised.

The change, however, which the act has accomplished is simply to assimilate the descent of estates in fee to that of estates tail. The purchaser is made the stock in lieu of the person last seised. It is evident, therefore, that upon the supposition last put, of the father of Edward Muggleton being the purchaser, although the estate was an estate in fee, the plaintiff would have been entitled as customary heir.

The step from this case to that which actually occurred is very easy. On failure of the issue of the purchaser (whether after his decease or in his lifetime it matters not), the heir to be sought is the heir of the purchaser, and not the heir of the person last seised ; and if the descent be governed by any special custom, then the customary heir of the purchaser must be sought for. Who, then, was the customary heir of Edward Muggleton, the purchaser ? The case in *Muggleton v. Barnett* expressly states, that the land descends, if no issue, to the youngest son of the youngest brother of the person last seised, that is, of the stock of descent. There is no magic in the phrase "last seised." These words were evidently used in the statement of the custom as they would have been used before the act in a statement of the common law. It would have been said

that the land descends, for want of issue, to the eldest son of the eldest brother of the person last seised. It would have been taken for granted that everybody knew that seisin made the stock. The law, however, is now altered in this respect. The purchaser only is the stock. If Edward Muggleton had died without leaving issue, the plaintiff clearly would have been entitled. His issue fails after his decease; but so long as *he* is the stock, the same person under the same custom must of necessity be his heir.

It was expressly stated in the case, that there was no formal record with respect to descents. This is important, as showing that the person last seised was mentioned in the statement of the custom simply in accordance with the ordinary rule of law, that the person last seised was the stock of descent prior to the act. If, however, there had been such a formal record, still Edward Muggleton, the purchaser, died seised. If he had not died seised, it might be said, according to the strict construction placed upon the records of customary descent, that the custom did not apply, and that his heir according to the common law was entitled (*d*). But in the present case the custom is expressly stated to be gathered from admissions only; and so long as the person last seised was by law the stock of descent, it is evident that a statement of the custom, as applying to the person last seised, was merely a statement with reference to the stock of descent as then existing. The act alters the stock of descent, and so far alters the custom. It substitutes the purchaser for the person last seised, whatever may be the custom as to descents. It follows, therefore, that the plaintiff in *Muggleton v. Barnett*, being the customary heir of the purchaser, was entitled to recover.

Since these observations were written, the following remarks have been made by Lord St. Leonards on the case of *Muggleton v. Barnett*: — “In the result, the Exchequer

(*d*) *Payne v. Parker*, O. Bridg. 18; *Rider v. Wood*, 1 K. & J. 644.

and Exchequer Chamber, with much diversity of opinion as to the extent of the custom, decided the case against the claimant, who claimed as heir by the custom to the *last purchaser*, which he was; because he was not heir by the custom to the *person last seised*. And yet the act extends to all customary tenures, and alters the descent in all such cases as well as in descents by the common law, by substituting the last purchaser as the stock from whom the descent is to be traced for the person last seised. The Court, perhaps, hardly explained the grounds upon which they held the statute not to apply to this case" (e).

(e) Lord St. Leonards' Essay on the Real Property Statutes, p. 271 (2nd ed.).

APPENDIX (C).

Referred to, p. 216.

THE point in question is as follows (a) :—Suppose a man to be the purchaser of freehold land, and to die seised of it intestate, leaving two daughters, say Susannah and Catherine, but no sons. It is clear that the land will then descend to the two daughters, Susannah and Catherine, in equal shares as coparceners. Let us now suppose that the daughter Catherine dies on or after the first of January, 1834, intestate, and without having disposed of her moiety in her lifetime, leaving issue one son. Under these circumstances the question arises, to whom shall the inheritance descend? The act to amend the law of inheritance enacts, “that in every case descent shall be traced from the purchaser.” In this case Catherine is clearly not the purchaser, but her father; and the descent of Catherine’s moiety is accordingly to be traced from him. Who, then, as to this moiety, is his heir? Supposing that, instead of the moiety in question, some other land were, after Catherine’s decease, to be given to the heir of her father, such heir would clearly be Susannah, the surviving daughter, as to one moiety of the land, and the son of Catherine as to the other moiety. It has been argued, then, that the moiety which belonged to Catherine, by descent from her father, must, on her

(a) The substance of the following observations appeared in the “Jurist” newspaper for February 28, 1846. The point has since been expressly decided, in accordance with the opinion for which the late author contended in *Cooper v. France*, 14 Jur. 214; S. C., 19

L. J., N. S., Ch. 813, the authority of which decision is recognized by Lord St. Leonards in his Essay on the Real Property Statutes, p. 282 (1st ed.), 269 (2nd ed.), and in *Lewin v. Lewin*, C. P. 21 Nov. 1874, stated in Williams on Seisin, pp. 81—84.

decease, descend to the heir of her father, in the same manner as other land would have done had she been dead in her father's lifetime ; that is to say, that one moiety of Catherine's moiety will descend to her surviving sister Susannah, and the other moiety of Catherine's moiety will descend to her son. But the following reasoning seems to show that, on the decease of Catherine, her moiety will not descend equally between her surviving sister and her own son, but will descend entirely to her son.

In order to arrive at our conclusion, it will be necessary to inquire, first, into the course of descent of an estate tail, under the circumstances above described, according to the old law ; secondly, into the course of descent of an estate in fee simple, according to the old law, supposing the circumstances as above described, with this qualification, that neither Susannah nor Catherine shall be considered to have obtained any actual seisin of the lands. And, when these two points shall have been satisfactorily ascertained, we shall then be in a better position to place a correct interpretation on the act by which the old law of inheritance has been endeavoured to be amended.

1. First, then, as to the course of descent of an estate, tail according to the old law. Let us suppose lands to have been given to the purchaser and the heirs of his body. On his decease, his two daughters, Susannah and Catherine, are clearly the heirs of his body, and as such will accordingly have become tenants in tail each of a moiety. Now there is no proposition more frequently asserted in the old books than this : that the descent of an estate tail is *per formam doni* to the heirs of the body of the donee. On the decease of one heir of the body, the estate descends not to the heir of such heir, but to the heir of the body of the original donee *per formam doni*. Suppose, then, that Catherine should die, her moiety would clearly have descended, by the old law, to the heir of the body of her father, the original donee in tail. Whom, then, under the above circumstances, did the old law consider to be the heir

of his body quoad this moiety? The Tenures of Littleton, as explained by Lord Coke's Commentary, supply us with an answer. Littleton says, "Also, if lands or tenements be given to a man in tail who hath as much land in fee simple, and hath issue two daughters, and dies, and his two daughters make partition between them, so as the land in fee simple is allotted to the younger daughter, in allowance for the land and tenements in tail allotted to the elder daughter; if, after such partition made, the younger daughter alieneth her land in fee simple to another in fee, and hath issue a son or daughter, and dies, the issue may enter into the lands in tail, and hold and occupy them in purparty with her aunt" (b). On this case Lord Coke makes the following comment:—"The eldest coparcener hath, by the partition, and the matter subsequent, barred herself of her right in the fee-simple lands, insomuch as when the youngest sister alieneth the fee-simple lands and dieth, and her issue entereth into *half the lands entailed*, yet shall not the eldest sister enter into *half of the lands* in fee simple upon the alienance" (c). It is evident, therefore, that Lord Coke, though well acquainted with the rule that an estate tail should descend *per formam doni*, yet never for a moment supposed that on the decease of the younger daughter, her moiety would descend half to her sister, and half to her issue; for he presumes, of course, that the issue would enter into *half the lands entailed*, that is, into the whole of the moiety of the lands which had originally belonged to their mother. After the decease of the younger sister, the heirs of the body of her father were no doubt the elder sister and the issue of the younger; but, *as to the moiety which had belonged to the younger sister*, this as clearly was not the case; the heir of the body of the father *to inherit this moiety* was exclusively the issue of such younger daughter, who were entitled to the whole of it in the place of their parent. This incidental allusion of Lord Coke is as strong, if not stronger, than a direct assertion by him of the doctrine: for it seems to show that a doubt on the subject never entered into his mind.

(b) Litt. sect. 260.

(c.) Co. Litt. 172 b.

At the end of the section of Littleton to which we have referred, it is stated that the contrary is holden, M., 10 Hen. VI.; *scil.* that the heir may not enter upon the parcener who hath the entailed land, but is put to a formedon. On this Lord Coke remarks (*d*), that it is no part of Littleton and is contrary to law; and that the case is not truly vouched, for it is not in 10 Hen. VI., but in 20 Hen. VI., and yet there is but the opinion of Newton, obiter, by the way. On referring to the case in the Year Books, it appears that Yelverton contended, that if the sister, who had the fee simple, aliened, and had issue, and died, the issue would be barred from the land entailed by the partition, which would be a mischief. To this Newton replied, "No, sir; but he shall have formedon, and shall recover *the half*" (*e*). Newton, therefore, though wrong in supposing that a formedon was necessary, thought equally with Lord Coke, that a *moiety* of the land was the share to be recovered. This appears to be the Newton whom Littleton calls (*f*) "my master, Sir Richard Newton, late Chief Justice of the Common Pleas."

There is another section in Littleton, which, though not conclusive, yet strongly tends in the same direction; namely, section 255, where it is said, that, if the tenements whereof two parceners make partition "be to them in fee tail, and the part of the one is better in yearly value than the part of the other, albeit they be concluded during their lives to defeat the partition, yet, if the parcener who hath the lesser part in value hath issue and die, the issue may disagree to the partition, and enter and *occupy in common* the other part which was allotted to her aunt, and so the other may enter and *occupy in common* the other part allotted to her sister, &c., as if no partition had been made." Had the law been that, on the decease of one sister, her issue were entitled only to an undivided fourth part, it seems strange that Littleton should not have stated that they might enter

(*d*) Co. Litt. 173 a.

(*e*) Year Book, 20 Hen. VI, 14 a.

(*f*) Sect. 729.

into a fourth only, and that the other sister might occupy the remaining three-fourths.

In addition to these authorities, there is a modern case, which, when attentively considered, is an authority on the same side; namely, *Doe d. Gregory and Geere v. Whichelo (g)*. This case, so far as it relates to the point in question was as follows:—Richard Lemmon was tenant in tail of certain premises, and died, leaving issue by his first wife one son, Richard, and a daughter, Martha; and by his second wife three daughters, Anne, Elizabeth, and Grace. Richard Lemmon, the son, as heir of the body of his father, was clearly tenant in tail of the whole premises during his life. He died, however, without issue, leaving his sister Martha of the whole blood, and his three sisters of the half blood, him surviving. Martha then intermarried with John Whichelo, and afterwards died, leaving John Whichelo, the defendant, her eldest son and heir of her body. John Whichelo, the defendant, then entered into the whole of the premises, under the impression that as he was heir to Richard Lemmon, the son, he was entitled to the whole. In this, however, he was clearly mistaken; for the descent of an estate tail is, as we have said, traced from the purchaser, or first donee in tail, *per formam doni*. The heirs of the purchaser, Richard Lemmon, the father, were clearly his four daughters, or their issue; for the daughters by the second wife, though of the half blood to their brother by the former wife, were, equally with their half sister Martha, of the whole blood to their common father. The only question then is, in what shares the daughters or their issue became entitled. At the time of the ejectment all the daughters were dead. Elizabeth was dead, without issue; whereupon her one equal fourth part devolved, without dispute, on her three sisters, Martha, Anne, and Grace: each of these, therefore, became entitled to one equal third part. Martha, as we have seen, died, leaving John Whichelo, the defendant, her eldest son and heir of her body. Anne died, leaving James Gregory, one of the lessors of the plaintiff, her grand-

son and heir of her body; and Grace died, leaving Diones Geere, the other lessor of the plaintiff, her only son and heir of her body. Under these circumstances, an action of ejectment was brought by James Gregory and Diones Geere; and on a case reserved for the opinion of the Court, a verdict was directed to be entered for the plaintiff *for two-thirds*. Neither the counsel engaged in the cause, nor the Court, seem for a moment to have imagined that James Gregory and Diones Geere could have been entitled to any other shares. It is evident, therefore, that the Court supposed that, on the decease of Martha, the heir of the body of the purchaser, *as to her share*, was her son, John Whichelo, the defendant; that on the decease of Anne, the heir of the body of the purchaser, *as to her share*, was James Gregory, her grandson; and that, on the decease of Grace, the heir of the body of the purchaser, *as to her share*, was her son, Diones Geere. On no other supposition can the judgment be accounted for, which awarded one-third of the whole to the defendant, John Whichelo, one other third to James Gregory, and the remaining third to Diones Geere. For let us suppose that, on the decease of each coparcener, her one-third was divided equally amongst the then existing heirs of the body of the purchaser; and the result will be, that the parties, instead of each being entitled to one-third, would have been entitled in fractional shares of a most complicated kind; unless we presume, which is next to impossible, that all the three daughters died at one and the same moment. It is not stated, in the report of the case, in what order the decease of the daughters took place; but according to the principle suggested, it will appear, on working out the fractions, that the heir of the one who died first would have been entitled to the largest share, and the heir of the one who died last would have been entitled to the smallest. Thus, let us suppose that Martha died first, then Anne, and then Grace. On the decease of Martha, according to the principle suggested, her son, John Whichelo, would have taken only one-third of her share, or one-ninth of the whole, and Anne and Grace, the surviving sisters, would each also have taken

one-third of the share of Martha, in addition to their own one third of the whole. The shares would then have stood thus : John Whichelo $\frac{1}{3}$, Anne $\frac{1}{3} + \frac{1}{3}$, Grace $\frac{1}{3} + \frac{1}{3}$. Anne now dies. Her share, according to the same principle, would be equally divisible amongst her own issue, James Gregory, and the heirs of the body of the purchaser, namely, John Whichelo and Grace. The shares would then stand thus : John Whichelo $\frac{1}{3} + \frac{1}{3} (\frac{1}{3} + \frac{1}{3})$; namely, his own share and one-third of Anne's shares = $\frac{2}{3}$; James Gregory, $\frac{1}{3} (\frac{1}{3} + \frac{1}{3}) = \frac{1}{3}$; Grace, $\frac{1}{3} + \frac{1}{3} + \frac{1}{3} (\frac{1}{3} + \frac{1}{3})$; namely, her own share and one-third of Anne's shares, = $\frac{1}{3}$. Lastly, Grace dies, and her share, according to the same principle, would be equally divisible between her own issue, Diones Geere, and John Whichelo and James Gregory, the other co-heirs of the body of the purchaser. The shares would then have stood thus : John Whichelo, $\frac{2}{3} + (\frac{1}{3} \times \frac{1}{3})$; namely, his own share and one-third of Grace's share, = $\frac{7}{9}$ of the entirety of the land: James Gregory, $\frac{1}{3} + (\frac{1}{3} \times \frac{1}{3})$; namely, his own share and one-third of Grace's share, = $\frac{4}{9}$; Diones Geere, $\frac{1}{3} \times \frac{1}{3} = \frac{1}{9}$. On the principle, therefore, of the descent of the share of each coparcener amongst the co-heirs of the body of the purchaser for the time being, the heir of the body of the one who died first would have been entitled to thirty-seven eighty-first parts of the whole premises; the heir of the body of the one who died next would have been entitled to twenty-eight eighty-first parts; and the heir of the body of the one who died last would have been entitled only to sixteen eighty-first parts. By the judgment of the Court, however, the lessors of the plaintiff were entitled each to one equal third part; thus showing that, although the descent of an estate tail under the old law was always traced from the purchaser (otherwise John Whichelo would have been entitled to the whole), yet this rule was qualified by another of equal force, namely, that all the lineal descendants of any person deceased should represent their ancestors; that is, should stand in the same place, and take the same share, as the ancestor would have done if living.

2. Let us now inquire into the course of descent of an

estate in fee simple, according to the old law, in case the purchaser should have died, leaving two daughters, Susannah and Catherine, neither of whom should have obtained any actual seisin of the lands, and that one of them (say Catherine) should afterwards have died, leaving issue one son. In this case, it is admitted on all sides, that the share of Catherine would have descended to the heir of the purchaser, and not to her own heir, in the character of heir to her; for the maxim was *seisina facit stipitem*. Had either of the daughters obtained actual seisin, her seisin would have been in law the actual seisin of the sister also; and on the decease of either of them her share would have descended, not to the heir of her father, but to her own heir, the seisin acquired having made her the stock of descent. In such a case, therefore, the title of the son of Catherine to the whole of his mother's moiety would have been indisputable; for, while he was living no one else could possibly have been her heir. The supposition, however, on which we are now to proceed is, that neither of the daughters ever obtained any actual seisin; and the question to be solved is, to whom, on the death of Catherine, did her share descend; whether equally between her sister and her son, as being together heir to the purchaser, or whether solely to the son, as being heir to the purchaser quoad his mother's share. In the late Mr. Sweet's valuable edition of Messrs. Jarman and Bythewood's Conveyancing (*h*), it is stated to be "apprehended that the share of the deceased sister would have descended in the same manner as by the recent statute it will now descend in every instance," which manner of descent is explained to be one-half of the share, or a quarter of the whole only, to the son, and the remaining half of the share to the surviving sister, thus giving her three-quarters of the whole. This doctrine, however, the writer submits, is erroneous; and in proof of such error it might be sufficient simply to call to mind the fact that the law of England had but one rule for the discovery of the

(*h*) Vol. i. p. 189. This point has, however, since been decided in accordance with the author's

opinion in *Paterson v. Mills*, V.-C. K. Bruce, 15 Jur. 1; *S. C.*, 19 L. J., N. S., Ch. 810.

heir. The heirs of a purchaser were, first the heirs of his body, and then his collateral heirs ; and an estate tail was merely an estate restricted in its descent to lineal heirs. If, therefore, the heir of a person had been discovered for the purpose of the descent of an estate tail, it is obvious that the same individual would also be heir of the same person for the purpose of the descent of an estate in fee simple. No distinction between the two is ever mentioned by Lord Coke, or any of the old authorities. Now, we have seen that the heir of the purchaser, under the circumstances above mentioned, for the purpose of inheriting an estate tail, was the son of the deceased daughter solely, *quoad the share which such daughter had held* ; and it would accordingly appear that the heir of the purchaser, to inherit an estate in fee simple, was also the son of the deceased daughter *quoad her share*. That this was in fact the case appears incidentally from a passage in the Year Book (i), where it is stated, that “ If there be two coparceners of a reversion, and their tenant for term of life commits waste, and then one of the parceners has issue and dies, and the tenant for term of life commits another waste, and the aunt and niece bring a writ of waste jointly, for they cannot sever, and the writ of waste is general, still their recovery shall be special ; for the aunt shall recover treble damages for the waste done, as well in the life of her parcener as afterwards, and the niece shall only recover damages for the waste done after the death of her mother, and the place wasted they shall recover jointly. And the same law is, if a man has issue two daughters and dies seised of certain land, and a stranger abates, and afterwards one of the daughters has issue two daughters and dies, and the aunt and the two daughters bring assize of mort d’ancestor ; here, if the aunt recover the *moiety* of the land and damages from the death of the ancestor, and the nieces recover *each one of them the moiety of the moiety* of the land, and damages from the death of their mother, still the writ is general.” Here we have all the circumstances required ; the father dies seised, leaving two daughters

(i) 35 Hen. VI. 23.

neither of whom obtains any actual seisin of the land, for a stranger abates,—that is, gets possession before them. One of the daughters then dies, without having had possession, and her share devolves entirely on her issue, not as heirs to her, for she never was seised, but as heirs to her father quoad her share. The surviving sister is entitled only to her original moiety, and the two daughters of her deceased sister take their mother's moiety equally between them.

There is another incidental reference to the same subject in Lord Coke's Commentary upon Littleton (*k*): "If a man hath issue two daughters, and is disseised, and the daughters have issue and die, the issues shall join in a præcipe, because one right descends from the ancestor, and *it maketh no difference* whether the common ancestor, being out of possession, *was before the daughters or after*, for that, in both cases, they must make themselves heirs to the grandfather which was last seised, and when the issues have recovered, they are coparceners, and one præcipe shall lie against them." "It maketh no difference," says Lord Coke, "whether the common ancestor, being out of possession, died before the daughters or after." Lord Coke is certainly not here speaking of the shares which the issue would take; but had any difference in the quantity of their shares been made by the circumstance of the daughters surviving their father, it seems strange that so accurate a writer as Lord Coke should not "herein" have "noted a diversity." The descent is traced to the issue of the daughters not from the daughters, but from their father, the common grandfather of the issue. On the decease of one daughter therefore, on the theory against which we are contending, the right to her share should have devolved, one-half on her own issue and the other half on her surviving sister; and, on the decease of such surviving sister, her three-quarters should, by the same rule, have been divided, one-half to her own issue, and the other half to the issue of her deceased sister; whereas it is admitted, that had the daughters

both died in their father's lifetime, their issue would have inherited in equal shares. Lord Coke, however, remarks no difference whether the father died before or after his daughters. Surely, then, he never could have imagined that so great an equality in the shares could have been produced by so mere an accident. It should be remembered that the rule of representation for which we are contending is the rule suggested by natural justice, and might well have been passed over without express notice; but had the opposite rule prevailed, the inequality and injustice of its operation could scarcely have failed to elicit some remark. This circumstance may, perhaps, tend to explain the fact that the writer has been unable, after a lengthened search, to find any authority expressly directed to the point; and yet, when we consider that in ancient times, the title by descent was the most usual one (testamentary alienation not having been permitted), we cannot doubt but that the point in question must very frequently have occurred. In what manner, then, can we account for the silence of our ancient writers on this subject, but on the supposition, which is confirmed by every incidental notice, that, in tracing descent from a purchaser, the issue of a deceased daughter took the entire share of their parent, whether such daughter should have died in the lifetime of the purchaser or after his decease.

Having now ascertained the course of descent among coparceners under the old law, whenever descent was traced from a purchaser, we are in a better situation to place a construction on that clause of the Act to amend the law of inheritance which enacts, "that in every case descent shall be traced from the purchaser" (1). What was the nature of the alteration which this Act was intended to effect? Was it intended to introduce a course of descent amongst coparceners hitherto unknown to the law, and tending to the most intricate and absurd subdivision of their shares? or did the Act intend merely to say that a descent

(1) Stat. 3 & 4 Will. IV. c. 106, s. 2.

from the purchaser, which had hitherto occurred only in the case of an estate tail, and in the case where the heir to a fee simple died without obtaining actual seisin, should now apply to every case? In other words, has the Act abolished the rule that, in tracing the descent from the purchaser, the issue of deceased heirs shall stand quoad their entire shares in the place of their parents? We have seen that previously to the Act, the rule that descent should be traced from the purchaser, whenever it applied, was guided and governed by another rule, that the issue of every deceased person should, quoad the entire share of such person, stand in his or her place. Why, then, should not the same rule of representation govern descent, now that the rule tracing descent from the purchaser has become applicable to every case? Had any modification been intended to be made of so important a rule for tracing descent from a purchaser, as the rule that the issue, and the issue alone, represent their ancestor, surely the Act would not have been silent on the subject. A rule of law clearly continues in force until it be repealed. No repeal has taken place of the rule that, in tracing descent from a purchaser, the issue shall always stand in the place of their ancestor. It is submitted, therefore, that this rule is now in full operation; and that, although in every case descent is now traced from the purchaser, yet the tracing of such descent is still governed by the rules to which the tracing of descent from purchasers was in former times invariably subject. If this be so, it is clear, then, that, under the circumstances stated at the commencement of this paper, the share of Catherine will descend entirely to her own issue, as heir to the purchaser quoad her share, and will not be divided between such issue and the surviving sister.

It is said, indeed, that by giving to the issue one-half of the share which belonged to their mother, the rule is satisfied which requires that the issue of a person deceased shall, in all cases, represent their ancestor; for it is argued that the issue still take one-fourth by representation, notwithstanding that the other fourth goes to the surviving

sister, who constitutes, together with such issue, one heir to their common ancestor. This, however, is a fallacy; the rule is, "that the lineal descendants in infinitum of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living" (*m*). Now, in what place would the deceased daughter have stood had she been living? Would she have been heir to one-fourth only, or would she not rather have been heir to the entire moiety? Clearly to the entire moiety, for had she been living, no descent of her moiety would have taken place; if, then, her issue are to stand in the place which she would have occupied if living, they cannot so represent her unless they take the whole of her share.

But it is said, again, that the surviving daughter may have aliened her share; and how can the descent of her deceased sister's share be said to be traced from the purchaser, if the survivor, who constitutes a part of the purchaser's heir, is to take nothing? The descent of the whole, it is argued, cannot be considered as traced over again on the decease of any daughter, because the other daughter's moiety may, by that time, have got into the hands of a perfect stranger. The proper reply to this objection seems to be, that the laws of descent were prior in date to the liberty of alienation. In ancient times, when the rules of descent were settled, the objection could scarcely have occurred. Estates tail were kept from alienation by virtue of the statute *De Donis* for about 200 years subsequent to its passing. Rights of entry and action were also inalienable for a very much longer period. Reversions expectant on estates of freehold, in the descent of which the same rule of tracing from the purchaser occurred, could alone have afforded an instance of alienation by the heir; and the sale of reversions appears to have been by no means frequent in early times. In addition to other reasons, the attornment then required from the particular tenant on every alienation of a reversion

(*m*) 2 Black. Comm. 216.

operated as a check on such transactions. It may, therefore, be safely asserted as a general proposition, that on the decease of any coparcener, the descent of whose share was to be traced from the purchaser, the shares of the other coparceners had not been aliened; and to have given them any part of their deceased sister's share, to the prejudice of her own issue, would have been obviously unfair, and contrary to the natural meaning of the rule, that "every daughter hath a several stock or root" (n). If, as we have seen, the rule remained the same with regard to estates tail, notwithstanding the introduction of the right of alienation (o), surely it ought still to continue unimpaired, now that it has become applicable to estates in fee, which enjoy a still more perfect liberty. Rules of law which have their foundation in natural justice, should ever be upheld, notwithstanding they may have become applicable to cases not specifically contemplated at the time of their creation.

(n) Co. Litt. 164 b.

(o) *Doe v. Whitchelo*, 8 T. R. 211; *ante*, p. 608.

APPENDIX (D).

Referred to, p. 282, n. (n).

ON the decease of a woman entitled by descent to an estate in fee simple, is her husband, having had issue by her, entitled, according to the present law, to an estate for life, by the curtesy of England, in the whole or any part of her share?(a).

In order to answer this question satisfactorily, it will be necessary, first, to examine into the principles of the ancient law, and then to apply those principles, when ascertained, to the law as at present existing. Unfortunately the authorities whence the principles of the old law ought to be derived do not appear to be quite consistent with one another; and the consequence is, that some uncertainty seems unavoidably to hang over the question above propounded. Let us, however, weigh carefully the opposing authorities, and endeavour to ascertain on which side the scale preponderates.

Littleton, "not the name of the author only, but of the law itself," thus defines curtesy: "Tenant by the curtesie of England is where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme, but in England only"(b). And, in a subsequent section, he adds, "Memorandum, that

(a) The substance of the following observations appeared in the "Jurist" newspaper for March 14, 1846.
(b) Litt. s. 85.

in every case where a man taketh a wife seised of such an estate of tenements, &c., as the issue which he hath by his wife may by possibility inherit the same tenements of such an estate as the wife hath, *as heir to the wife*; in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, *but otherwise not*"(c). "Memorandum," says Lord Coke, in his Commentary(d), "this word doth ever betoken some excellent point of learning." Again, "*As heir to the wife*. This doth imply a secret of law; for, except the wife be actually seised, the heir shall not (as hath been said) make himself heir to the wife; *and this is the reason*, that a man shall not be tenant by the curtesie of a seisin in law." Here, we find it asserted by Littleton, that the husband shall not be tenant by the curtesy, unless he has had issue by his wife capable of inheriting the land *as her heir*; and this is explained by Lord Coke to be such issue as would have traced their descent from the wife, as the stock of descent, according to the maxim, "*seisina facit stipitem*." Unless an actual seisin had been obtained by the wife, she could not have been the stock of descent; for the descent of a fee simple was traced from the person last actually seised; "*and this is the reason*," says Lord Coke, "that a man shall not be tenant by the curtesy of a mere seisin in law." The same rule, with the same reason for it, will also be found in *Paine's case*(e), where it is said, "And when Littleton saith, *as heir to the wife*, these words are very material; for that is *the true reason* that a man shall not be tenant by the curtesy of a seisin in law; for, in such case, the issue ought to make himself heir to him who was last actually seised." The same doctrine again appears in Blackstone(f). "And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually

(c) Litt. s. 52.
(d) Co. Litt. 40 a.

(e) 8 Rep. 36 a.
(f) 2 Black. Comm. 128.

seised; and, therefore, as the husband had never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. And hence," continues Blackstone in his usual laudatory strain, "we may observe, with how much nicety and consideration the old rules of law were framed, and how closely they are connected and interwoven together, supporting, illustrating and demonstrating one another." Here we have, indeed, a formidable array of authorities, all to the point, that, in order to entitle the husband to his curtesy, his wife must have been the stock from whom descent should have been traced to her issue; for the principal and true reason that there could not be any curtesy of a seisin in law is stated to be, that the issue could not, in such a case, make himself heir to the wife, because his descent was then required to be traced from the person last actually seised.

Let us, then, endeavour to apply this principle to the present law. The act for the amendment of the law of inheritance (*g*) enacts (*h*), that, in every case, descent shall be traced from the purchaser. On the decease of a woman entitled by descent, the descent of her share is, therefore, to be now traced, not from herself, but from her ancestor, the purchaser from whom she inherited. With respect to the persons to become entitled, as heir to the purchaser on this descent, if the woman be a coparcener, the question arises, which has already been discussed (*i*), whether the surviving sister equally with the issue of the deceased, or whether such issue solely, are now entitled to inherit? And the conclusion at which we arrived was, that the issue solely succeeded to their mother's share. But, whether this be so or not, nothing is clearer than that, on the decease of a woman entitled by descent, the persons who next inherit take as heir to the purchaser, and not to her; for, from the purchaser alone can descent now be traced; and the mere circumstance of having obtained an actual seisin does not now make the heir the stock of descent. How, then, can her husband be

(*g*) 2 & 4 Will. IV. c. 106.
(*h*) Sect. 2.

(*i*) Appendix (C), *ante*, p. 599.

entitled to hold her lands as tenant by the curtesy? If tenancy by the curtesy was allowed of those lands only of which the wife had obtained actual seisin, because it was a necessary condition of curtesy that the wife should be the stock of descent, and because an actual seisin alone made the wife the stock of descent, how can the husband obtain his curtesy in any case where the stock of descent is confessedly not the wife, but the wife's ancestor? Amongst all the recent alterations of the law, the doctrine of curtesy has been left untouched; there seems, therefore, to be no means of determining any question respecting it, but by applying the old principles to the new enactments, by which, indirectly, it may be affected. So far, then, as at present appears, it seems a fair and proper deduction from the authorities, that, whenever a woman has become entitled to lands by descent, her husband cannot claim his curtesy, because the descent of such lands, on her decease, is not to be traced from her.

But, by carrying our investigation a little further, we may be disposed to doubt, if not to deny, that such is the law; not that the conclusion drawn is unwarranted by the authorities, but the authorities themselves may, perhaps, be found to be erroneous. Let us now compare the law of curtesy of an estate tail with the law of curtesy of an estate in fee simple.

In the section of Littleton, which we have already quoted(*k*), it is laid down, that, if a man taketh a wife *seised as heir* in tail especial, and hath issue by her, born alive, he shall, on her decease, be tenant by the curtesy. And on this Lord Coke makes the following commentary: "And here Littleton intendeth a seisin in deed, if it may be attained unto. As if a man dieth seised of lands in fee simple or *fee tail* general, and these lands descend to his daughter, and she taketh a husband and hath issue, *and dieth before any entry*, the husband shall not be tenant by the curtesy, and yet, in this case, she had a seisin in law;

(*k*) Sect. 85.

but, if she or her husband had, during her life, entered, he should have been tenant by the curtesy."⁽¹⁾ Now, it is well known that the descent of an estate tail is always traced from the purchaser or original donee in tail. The actual seisin which might be obtained by the heir to an estate tail never made him the stock of descent. The maxim was "*Possessio fratris de feudo simplici facit sororem esse hæredem.*" Where, therefore, a woman who had been seised as heir or coparcener in tail died, leaving issue, such issue made themselves heir not to her, but to her ancestor, the purchaser or donee; and whether the mother did or did not obtain actual seisin was, in this respect, totally immaterial. When actual seisin was obtained, the issue still made themselves heir to the purchaser only, and yet the husband was entitled to his curtesy. When actual seisin was not obtained, the issue were heirs to the purchaser as before; but the husband lost his curtesy. In the case of an estate tail, therefore, it is quite clear that the question of curtesy or no curtesy depended entirely on the husband's obtaining for his wife an actual seisin, and had nothing to do with the circumstance of the wife's being or not being the stock of descent. The reason, therefore, before mentioned given by Lord Coke, and repeated by Blackstone, cannot apply to an estate tail. An actual seisin could not have been required *in order* to make the wife the stock of descent, because the descent could not, under any circumstances, be traced from her, but must have been traced from the original donee to the heir of *his* body *per formam doni*.

Again, if we look to the law respecting curtesy in incorporeal hereditaments, we shall find that the reason above given is inapplicable; for the husband, on having issue born, was entitled to his curtesy out of an advowson and a rent, although no actual seisin had been obtained, in the wife's lifetime, by receipt of the rent or presentation to the advowson⁽ⁿ⁾. And yet, in order to make the wife the stock of descent as to such hereditaments, it was necessary

(1) Co. Litt. 29 a.

(n) Watk. Descents, 89 (47, 4th ed.).

that an actual seisin should be obtained by her(o). The husband, therefore, was entitled to his curtesy where the descent to the issue was traced from the ancestor of his wife, as well as where traced from the wife herself. In this case, also, the right of curtesy was, accordingly, independent of the wife's being or not being the stock from which the descent was to be traced.

We are driven, therefore, to search for another and more satisfactory reason why an actual seisin should have been required to be obtained by the wife, in order to entitle her husband to his curtesy out of her lands; and such a reason is furnished by Lord Coke himself, and also by Blackstone. Lord Coke says(p), "Where lands or tenements descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin. *as the husband may do of his wife's land when he is to be tenant by curtesy*, which is worthy the observation." It would seem from this, therefore, that the reason why an actual seisin was required to entitle the husband to his curtesy was, that his wife may not suffer by his neglect to take possession of her lands; and, in order to induce him to do so, the law allowed him curtesy of all lands of which an actual seisin had been obtained, but refused him his curtesy out of such lands as he had taken no pains to obtain possession of. This reason is also adopted by Blackstone from Coke: "A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; *which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself, in her right, was actually seised in deed*"(q). The more we investigate the rules and principles of the ancient law, the greater will appear the probability that this reason was indeed the true

(o) Watk. Descents, 60 (87,
4th ed.).

(p) Co. Litt. 31 a.
(q) 2 Black. Comm. 181.

one. In the troublous times of old, an actual seisin was not always easily acquired. The doctrine of continual claim shows that peril was not unfrequently incurred in entering on lands for the sake of asserting a title; for, in order to obtain an actual seisin, any person entitled, if unable to approach the premises, was bound to come as near as he dare(*r*). And "it is to be observed," says Lord Coke, "that every doubt or fear is not sufficient, for it must concern the safety of the person of a man, and not his houses or goods; for if he fear the burning of his houses or the taking away or spoiling his goods, this is not sufficient"(*s*). That actual seisin should be obtained was obviously most desirable, and nothing could be more natural or reasonable than that the husband should have no curtesy where he had failed to obtain it. Perkins seems to think that this was the reason of the rule; for in his Profitable Book he answers an objection to it, founded on an extreme case. "But if possession in law of lands or tenements in fee descend unto a married woman, which lands are in the county of York, and the husband and his wife are dwelling in the county of Essex, and the wife dieth within one day after the descent, so as the husband could not enter during the coverture, for the shortness of the time, yet he shall not be tenant by the curtesy, &c.; and yet, according to common pretence, there is no *default in the husband*. But it may be said that the husband of the woman, before the death of the ancestor of the woman, might have spoken unto a man dwelling near unto the place where the lands lay, to enter for the woman, as in her right, immediately after the death of her ancestor," &c.(*t*). This reason for the rule is also quite consistent with the circumstance that the husband was entitled to his curtesy out of incorporeal hereditaments, notwithstanding his failure to obtain an actual seisin. For if the advowson were not void, or the rent did not become payable during the wife's life, it was obviously impossible for the husband to present to the one or receive the other; and it would have been unreasonable that he

(*r*) Litt. ss. 419, 421.
 (*s*) Co. Litt. 253 b.

(*t*) Perk. 470.

should suffer for not doing an impossibility, the maxim being "*impotentia excusat legem*." This is the reason, indeed, usually given to explain this circumstance; and it will be found both in Lord Coke(*u*) and Blackstone(*x*). This reason, however, is plainly at variance with that mentioned in the former part of this paper, and adduced by them to explain the necessity of an actual seisin, in order to entitle the husband to his curtesy out of lands in fee simple.

There still remains, however, the section of Littleton, to which we have before referred(*y*), as an apparent authority on the other side. Littleton expressly says, that when the issue may, by possibility, inherit, *of such an estate as the wife hath, as heir to the wife*, the husband shall have his curtesy, but *otherwise not*; and we have seen that, according to Lord Coke's interpretation, to inherit *as heir to the wife*, means here to inherit *from the wife as the stock of descent*. But the legitimate mode of interpreting an author certainly is to attend to the context, and to notice in what sense he himself uses the phrase in question on other occasions. If now we turn to the very next section of Littleton, we shall find the very same phrase made use of in a manner which clearly shows that Littleton did not mean, by inheriting as heir to a person, inheriting from that person as the stock of descent. For, after having thus laid down the law as to curtesy, Littleton continues: "And, also, in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as, by possibility, it may happen that the wife may have issue by her husband, and that the same issue may, by possibility, inherit the same tenements *of such an estate as the husband hath, as heir to the husband*, of such tenements she shall have her dower, and *otherwise not*"(*z*). Now, nothing is clearer than that a wife was entitled to dower out of the lands of which her husband had only seisin in law(*a*); and nothing, also, is clearer than that

(*u*) Co. Litt. 29 a.
 (*x*) 2 Black. Comm. 127.
 (*y*) Sect. 52.

(*z*) Litt. s. 58.
 (*a*) Watk. Descents, 32 (42, 4th ed.).

a seisin in law only was insufficient to make the husband the stock of descent: for, for this purpose, an actual seisin was requisite, according to the rule "*seisina facit stipitem*." In this case, therefore, it is obvious that Littleton could not mean to say that the husband must have been made *the stock of descent*, by virtue of having obtained an actual seisin: for that would have been to contradict the plainest rules of law. What, then, was his meaning? The subsequent part of the same section affords an explanation: "For, if tenements be given to a man and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate tail as donee in special tail. Yet, if the husband die without issue, the same wife shall be endowed of the same tenements, because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But, if the wife dieth leaving her husband, and after the husband taketh another wife and dieth, his second wife shall not be endowed in this case, *for the reason aforesaid*." This example shows what was Littleton's true meaning. He was not thinking, either in this section or the one next before it, of the husband or wife being the stock of descent, instead of some earlier ancestor. He was laying down a general rule, applicable to dower as well as to curtesy; namely, that if the issue that might have been born in the one case, or that were born in the other, of the surviving parent, could not, by possibility, inherit the estate of their deceased parent, by right of representation of such parent, then the surviving parent was not entitled to dower in the one case, or to curtesy in the other. It is plain that, in the example just adduced, the issue of the husband by his second marriage could not possibly inherit his estate, which was given to him and the heirs of his body by his first wife; the second wife, therefore, was excluded from dower out of this estate. And, in the parallel case of a gift to a woman and the heirs of her body by her first husband, it is indisputable that, for a precisely similar reason, her second husband could not

claim his curtesy on having issue by her; for such issue could not possibly inherit their mother's estate. All that Littleton then intended to state with respect to curtesy, was the rule laid down by the Statute De Donis(*b*), which provides that, where any person gives lands to a man and his wife and the heirs of their bodies, or where any person gives land in frankmarriage, the second husband of any such woman shall not have anything in the land so given, after the death of his wife, by the law of England, nor shall the issue of the second husband and wife succeed in the inheritance(*c*). When the two sections of Littleton are read consecutively, without the introduction of Lord Coke's commentary, their meaning is apparent; and the intervening commentary not only puts the reader on the wrong clue, but hinders the recovery of the right one, by removing to a distance the explanatory context.

If our construction of Littleton be the true one, it throws some light on the question discussed in Appendix (C), on the course of descent amongst coparceners. We there endeavoured to show that the issue of a coparcener always stood in the place of their parent, by right of representation, even where descent was traced from some more remote ancestor as the stock. Littleton, with this view of the subject in his mind, and never suspecting that any other could be entertained, might well speak generally of issue inheriting *as heir* to their parent, even though the share of the parent might have descended to the issue as heir to some more remote ancestor. The authorities adduced in Appendix (C) thus tend further to explain the language of Littleton; whilst the language of Littleton, as above explained, illustrates and confirms the authorities previously adduced.

Having at length arrived at the true principles of the old law, the application of them to the state of circumstances produced by the new law of inheritance will be very easy.

(*b*) 13 Edw. I. c. 1.

of England (C), 1.

(*c*) See Bac. Abr. tit. Curtesy

A coparcener dies leaving a husband who has had issue by her, and leaving one or more sisters surviving her. The descent of her share is now traced from their common parent, the purchaser. But, in tracing this descent, we have seen in Appendix (O), that the issue of the deceased coparcener would inherit her entire share by representation of her. And the condition which will entitle her husband to curtesy out of her share appears to be, that his issue might possibly inherit the estate by right of representation of their deceased mother. This condition, therefore, is obviously fulfilled, and our conclusion consequently is, that the husband of a deceased coparcener, who has had issue by her, is entitled to curtesy out of the whole of her share. But in order to arrive at this conclusion, it seems that we must admit, first, that Lord Coke has endeavoured to support the law by one reason too many; and, secondly, that one laudatory flourish of Blackstone has been made without occasion.

APPENDIX (E).

Referred to, p. 380 (a).

IF the rule of perpetuity, which restrains executory interests within a life or lives in being and twenty-one

(a) It was contended in *Lewis on Perpetuities*, pp. 408 *et seq.*, that the rule forbidding the limitation of an estate to the child of an unborn person in remainder after a life estate to the unborn parent, should be considered as merely an instance of the rule against perpetuities; and it was there laid down (p. 420) that such a remainder would be good, if limited to such child as should be born within the period allowed by the rule against perpetuities. Against this opinion the late Mr. Joshua Williams maintained in the 3rd and subsequent editions of this book that "this rule is more stringent than that which confines executory interests; and if there were no other restraint on the creation of contingent remainders than the rule by which executory interests are confined, landed property might in many cases be tied up for at least a generation further than is now possible." This position he supported by the argument given in this Appendix. Further discussion of the question will be found in the notes to *Cadell v. Palmer*, *Tudor's Leading Cases on Real Property*, pp. 470 *et seq.*, 3rd ed.; *Davidson, Prec. Conv.* vol. iii. pp. 336—338, 3rd ed.; 1 *Jarm. Wills*, 258 and Appx. A, 4th ed.; *Challis on Real Property*, 159; 183, 2nd ed.; *J. C. Gray, Rule against Perpetuities* (Boston, 1886), pp. 135 *et seq.*, 204—218; *Law Quarterly Review*, vi. 410 *et seq.* As we have seen, the law is now laid down in accordance with Mr. Joshua Williams's contention; *ante*, p. 381. Mr. Gray's treatise (Ch. V.) contains a most admirable account of the origin and history of the rule against perpetuities; and I have been greatly indebted to it during the preparation of this work. He shows clearly (1) that the rule against perpetuities was not introduced by analogy to the time for which land could be tied up under the usual family settlement; (2) that the rule forbidding the limitation of an estate, in remainder after a life estate to an unborn person, to any child of such unborn person, did not take shape till the latter half of the eighteenth century; (3) that there is no authority for referring the origin of this rule to the doctrine against double possibilities, an explanation, which is founded solely on *dicta* of conveyancers and text-writers. It is probable therefore that the conveyancers, who devised the modern form of settlement, were influenced by the dread of infringing the policy of the law, for bidding perpetuities, rather than by the fear of relying on a too remote possibility; and that they confined the estates given to unborn persons to the children of the living, because such persons must necessarily be ascertained within existing lives.

As to the rule, about the child of the unborn, being an instance of

years afterwards, be, as is sometimes contended (*b*), the only limit to the settlement of real estate by way of remainder, the following limitations would be clearly unobjectionable:—To the use of A., a living unmarried person, for life, with remainder to the use of his first son for life, with remainder to the use of the first son of such first son, born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of the first and other sons of such first son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, successively in tail male, with remainder to the use of the first

the rule against perpetuities, Mr. Gray argues strongly against Mr. Joshua Williams's view. My own view is expressed in the text (*ante*, pp. 374 *et seq.*). Shortly it is that there is a general principle of legal policy, prohibiting all contrivances, which tend to create a perpetuity. In the case of executory interests, this principle found definite expression in the rule against perpetuities settled in 1833. In the case of contingent remainders, the same principle found expression in the rules laid down in 1889 in the cases of *Whitby v. Mitchell* and *Re Frost* (*ante*, pp. 381, 382). In the former case it is evident, I think, that Mr. Justice Kay was greatly influenced by the fear of sanctioning any possible extension of the time of settlement (see 42 Ch. D. 502). In the latter, he expressly invoked the principle referred to (43 Ch. D. 253, 254). It may be observed that the decision in *Whitby v. Mitchell* raises the question, whether limitations to the children of unborn persons are void in cases, which do not exactly fall within the rule there laid down. For instance, is a limitation good to A., a bachelor, for life, and after his death to the eldest son of his eldest son in fee? Also, are limitations good to A., a bachelor, for life, with remainder to his eldest son *in tail*, with remainder to the eldest son of A.'s eldest son in fee or in tail? It is submitted that in each case the limitation to the eldest son of A.'s eldest son should be held valid; unless the supposed rule against double possibilities is to be brought to life to make it void; see note (*k*) to p. 335, *ante*. In the first instance taken, the contingent remainder is limited after a *vested* estate; and it is submitted that such contingent remainders are governed only by rule 1 given in the text (*ante*, pp. 380, 378), and that rules 2 and 3 apply only to the creation of successive contingent remainders. And it is settled that an estate may be given by an executory limitation to an unborn descendant, however remote, so long as it must necessarily arise within due time; *Thelluson v. Woodford*, 4 Ves. 227, 11 Ves. 112. It may be noted that it appears from this, since contingent remainders of equitable estates have been held to be governed by the rule as to remoteness applicable to executory interests (*ante*, p. 383), that the hypothetical settlement given in this appendix might be made by simply vesting the legal fee in trustees; a course, which would cause little practical inconvenience, since the Settled Land Act (see *ante*, pp. 118—120, 177). As to the second instance given, it is submitted that there should be no question of remoteness in limitations to take effect after an estate tail (*ante*, p. 383).—EDITOR'S NOTE.

(*b*) Lewis on Perpetuity, pp. 408 *et seq.*

son of the first son of A., born in his lifetime, or within twenty-one years after his decease, in tail male, with remainder to the use of the second son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of his first and other sons, born in the lifetime of A., or within twenty-one years after his decease, successively in tail male, with remainder to the use of the second son of the first son of A., born in his lifetime, or within twenty-one years after his decease, in tail male, with remainder to the use of the third son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of his first and other sons, born as before, successively in tail male, with remainder to the use of such third son of the first son of A., born as before, in tail male, with like remainders to the use of the fourth and every other son of such first son of A., born as before, for life respectively, followed by like remainders to the use of their respective first and other sons, born as before, successively in tail male, followed by like remainders to the use of themselves in tail male; with remainder to the use of the first son of A. in tail male; with remainder to the use of the second son of A. for life; with similar remainders to the use of his sons, and sons' sons, born as before; with remainder to the use of such second son of A. in tail male, and so on.

It is evident that every one of the estates here limited must necessarily arise within a life in being (namely, that of A.) and twenty-one years afterwards. And yet here is a settlement which will in all probability tie up the estate for three generations: for the eldest son of a man's eldest son is very frequently born in his lifetime, or, if not, will most probably be born within twenty-one years after his decease. And great grandchildren, though not often born in the lifetime of their great-grandfather, are yet not unusually born within twenty-one years of his death. Now if a settlement such as this were legal, it would, we may fairly presume, have been adopted before now; for conveyancers are

frequently instructed to draw settlements containing as strict an entail as possible; and the Court of Chancery has also sometimes had occasion to carry into effect executory trusts for making strict settlements. In these cases it would be the duty of the draftsman, or of the Court, to go to the limit of the law in fettering the property in question. But it may be safely asserted that in no single case has a settlement, such as the one suggested, been drawn by any conveyancer, much less sanctioned by the Court of Chancery, or now by the Chancery Division of the High Court. The utmost that on these occasions is ever done is to give life estates to all living persons, with remainder to their first and other sons successively in tail male. As, therefore, the best evidence of a man's having had no lawful issue is that none of his family ever heard of any, so the best evidence that such a settlement is illegal is that no conveyancer ever heard of such a draft being drawn.

APPENDIX (F).

Referred to, p. 389, n. (e).

It has been remarked that the author differs from the view of the Court of Exchequer Chamber in the case of *Lord Dunraven v. Llewellyn* (a) without stating his reason (b). In that case the Court held that there was no general common law right of tenants of a manor to common on the waste; but the author remarked that, in his humble opinion, the authorities cited by the Court tend to the opposite conclusion (c). The judgment of the Court is as follows:—

The judgment.

“ The question in this case is, whether my brother Platt was right in rejecting evidence of reputation, offered on the trial before him, to show the title of the lord of the manor of Ogmore to certain lands within the ambit of the manor.

“ The evidence was that there were very many lands and tenements held of the manor, the tenants whereof, in respect of those lands, had always exercised rights of common for all their commonable cattle on a certain waste adjoining to which was the *locus in quo*; and that the deceased persons, being such tenants and exercising rights *ante litem motam*, declared that the *locus in quo*

(a) 15 Q. B. 791.

(b) Six Essays on Commons Preservation, Essay 3, by Mr. F. O. Crump, p. 188.

(c) This appendix first appeared in the eighth edition of this book, published in 1868. As to the legal proposition sought to be established in this appendix, the reader is referred to the cases cited

in note (y) to p. 389, *ante*. With regard to the question of the historical origin of common appendant, he is referred to the late author's Rights of Common (1880), pp. 37 *et seq.*, to Mr. Scrutton's Essay on Commons and Common Fields (1887), Ch. II., and to Professor Vinogradoff's Villainage in England (1892), Essay II., Ch. II.

“was parcel of the waste. Another description of evidence
 “was, that certain deceased residents in the manor had
 “made similar declarations. No evidence was given of the
 “exercise of the rights of those tenants over the *locus in*
 “*quo*. My brother Platt rejected the evidence; and, we
 “think, rightly.

“In the course of the argument we intimated our opinion
 “that the want of evidence of acts of enjoyment of the rights
 “did not affect the admissibility of the evidence, but only
 “its value when admitted. We also stated that no objection
 “could be made to the evidence on the ground that it pro-
 “ceeded from persons who had not competent knowledge
 “upon the subject, or from persons who were themselves
 “interested in the question. The main inquiry was whether
 “this was a subject of a sufficiently public nature to justify
 “the reception of hearsay evidence relating to it.

“If this question had been one in which all the inhabitants
 “of the manor, or all the tenants of it, or a particular dis-
 “trict of it, had been interested, reputation from any deceased
 “inhabitant or tenant, or even deceased residents in the
 “manor, would have been admissible, such residents having
 “presumably a knowledge of such local customs; and if
 “there had been a common law right for every tenant of
 “the manor to have common on the wastes of it, reputa-
 “tion from any deceased tenant as to the extent of those
 “wastes, and therefore as to any particular land being waste
 “of the manor, would have been admissible. But although
 “there are some books which state that common appendant
 “is of common right, and that common appendant is the
 “common law right of every free tenant in the lord’s
 “wastes; for example, note (1) to *Mellor v. Spateman* (d);
 “*Bennett v. Reeve* (e); Com. Dig. Common (B), it is not to
 “be understood that every tenant of a manor has by
 “common law such a right, but only that certain tenants
 “have such a right, not by prescription, but as a right by
 “common law, incident to the grant.

(d) 1 Wms. Saund. 346 d (6th ed.).

(e) Willes, 227, 231.

“This is explained in Lord Coke’s Commentaries on the Statute of Merton (*f*), 2 Inst. 85. He says, ‘By this recital’ (of that statute) ‘a point of the ancient common law appeareth, that when a lord of a manor (whereon was great waste grounds) did enfeof others of some parcels of arable land, the feoffees *ad manutenend’ servitium socæ* should have common in the said wastes of the lord for two causes. As incident to the feoffment, for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture, and by consequence the tenant should have common in the wastes of the lord for his beasts which do plough and manure his tenancy as appendant to his tenancy, and this was the beginning of common appendant. The second reason was, for maintenance and advancement of agriculture and tillage, which was much favoured in law.’ The same law is laid down by Coke and Foster, 1 Roll. Abr. 396, l. 45, tit. Common(C), pl. 4.

“This right, therefore, is not a common right of all tenants, but belongs only to each grantee, before the statute of *Quia Emptores*, of arable land by virtue of his individual grant, and as an incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant or by prescription, though it differs in its extent, being limited to such cattle as are kept for ploughing and manuring the arable land granted, and as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits, and depends on the will of the grantor.

“We are therefore of opinion that this case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lords wastes; and reputation is not admissible in the case of such separate rights, each being private, and depending on each separate

“prescription, unless the proposition can be supported that,
 “because there are many such rights, the rights have a
 “public character, and the evidence, therefore, becomes
 “admissible.

“We think this position cannot be maintained. It is
 “impossible to say in such a case where the dividing point is.
 “What is the number of rights which is to cause their nature
 “to be changed, and to give them a public character?

“But it is said that there are cases which have decided
 “that where there are numerous private prescriptive
 “rights reputation is admissible; and the case of *Weeks v.*
 “*Sparke*(g) is relied upon as establishing that proposition.
 “The reasons given by the different judges in that case
 “would certainly not be satisfactory at this day; some
 “putting it on the ground of the custom of the circuits, some
 “upon the ground that where there was proof of the enjoy-
 “ment of the right, reputation was admissible. Both these
 “reasons are now held to be insufficient. It may be that
 “the evidence admitted was that of reputation from deceased
 “commoners, which would be admissible on the same
 “principle that the statement of a deceased person in pos-
 “session of land abridging or limiting his interest is admis-
 “sible; but that reason does not apply to the present case,
 “because the statements are used to extend, not to limit the
 “rights. It was also said that the case of *Weeks v. Sparke*(g)
 “had since been sanctioned by the Court of Queen’s Bench
 “in that of *Pritchard v. Powell*(h), where it was held that
 “reputation was admissible to prove common between two
 “wastes *pur cause de vicinage*. But the claim in that case
 “was treated as a matter of immemorial custom (see p. 603),
 “and reputation in support of a custom is admissible.

“We are of opinion, therefore, that the evidence of
 “reputation offered in this case was, according to the well
 “established rule in the modern cases, inadmissible, as it is
 “in reality in support of a mere private prescription; and

(g) 1 M. & S. 679.

(h) 10 Q. B. 589.

"the number of these private rights does not make them to be of a public nature.

"Therefore the judgment must be affirmed."

Judgment affirmed.

The substance of the argument of the Court.

The substance of the argument of the Court appears to be this: Common appendant is not a right of all tenants, but only of *certain* of the tenants, namely, the tenants of arable land; and being the individual right of some, and not the general right of all, it is not of so public a nature as to warrant the admission of evidence of reputation concerning it.

Serjeant Williams's note.

The authorities cited are:—

1. Note (l) to *Mellor v. Spateman* (i). This is as follows:—
 "Common appendant; being the common law right of every
 "free tenant of a manor on the lord's wastes (Com. Dig. tit.
 "Common (B)), is confined to such and so many cattle as the
 "tenant has occasion for, to plough and manure his land, in
 "proportion to the quantity thereof."

Bennett v. Reeve.

2. The case of *Bennett v. Reeve* (k). It is there said—
 "The reason for common appendant appears to be this, that
 "as the tenant would necessarily have occasion for cattle,
 "not only to plough but likewise to manure his own land,
 "he must have some place to keep such cattle in whilst the
 "corn is growing on his own arable land, and therefore of
 "common right (if the lord had any waste) he might put
 "his cattle there when they could not go on his own arable
 "land. This is a simple and intelligible reason for this
 "custom, and is said to be the reason in Co. Litt. 122a."

Comyns' Digest.

3. Comyns' Digest, tit. Common (B). It is there said—
 "Common appendant is of common right. 1 Roll. 396, l. 44.
 "For if a man had enfeoffed others, before the Statute of
 "Quia Emptores Terrarum, of lands parcel of his manor,

(i) 1 Wms. Saund. 346 d (6th ed.).

(k) Willes, 227, 231.

“the feoffees should have common for their commonable
 “cattle within the wastes, &c. of the lord, as incident to
 “their feoffment. 2 Inst. 85, 6, per 2 J.; 1 Roll. 396, l. 45;
 “4 Co. 37.”

The last authority is Lord Coke's Commentary on the Statute of Merton, which is set out at length in the judgment of the Court.

It is admitted that common appendant cannot belong to any but arable land. It cannot belong to a house, as such, ^{Admitted exceptions.} exclusive of any yard or place for cattle, nor can it belong to ancient meadow or pasture, nor to an ancient wood^(l), nor to the bed of a river, nor, it is presumed, to the soil of a highway, nor to mines and minerals, of all which there may be tenants. All these are admitted exceptions. But the admission of an exception is not necessarily the destruction of a rule. And it is submitted that, as a rule, in the ^{The rule.} times of the Normans, all tenants were tenants of arable land, that the meadow and pasture lands were subservient to the arable, that by land was primarily meant arable land, that the exceptions depend simply on the nature of their subject-matter, and that the rights of the owners of arable land in a manor were the rights of the whole agricultural public in that manor, and, as such, of a sufficiently public nature to make reputation properly admissible in questions concerning them.

A tenant in former times required a house to live in, arable land for his maintenance, pasture for his cattle, acorns for his pigs, and wood for fuel and repairs. Accordingly, in the argument in *Hill v. Grange*^(m), it is said, “Every-
 “thing is placed in writs by the rule of the register accord-
 “ing to its dignity; for which reason a messuage is placed
 “before land, and land before meadow, and meadow before
 “pasture, *et sic de similibus*. And everything is ranked
 “and distinguished in dignity according to its necessary use

^(l) See *Earl of Sefton v. Court*,
 5 B. & C. 917, 922.

^(m) Plowd. 164, 169.

The land was
for bread.

In Domesday,
meadow
measured by
ploughs.

Meadows
belonged to
land.

"in life; for to have a house for a man to dwell in, and to defend his body against the coldness and inclemency of the air, is more necessary than to have land to plough for bread; and to have land for bread is again more necessary than to have meadow for hay for cattle; and to have meadow for hay, which will serve the whole year, is more necessary than pasture, *et sic de similibus*." Here it is said that land is for bread. By "land" is meant "arable land," according to the well-understood meaning of the word in ancient times. And the land was for bread. Every tenant took land because he desired to live upon the corn it grew. Meadow, pasture or wood, without arable land, was of no use, and therefore not taken alone. The meadow and pasture were required to support the horses, cattle and sheep, by means of which the land was tilled and manured, and the woods in those days were chiefly valuable as affording sustenance for the pigs. *Porci inannulati*, or unrun pig, are the objects of frequent animadversion in sundry old court rolls(n). In Domesday Book the meadow land is frequently measured by ploughs. Thus, in Kensington (Chenesit) there was land to ten ploughs, meadow for two ploughs, pasture for the cattle of the village, and pannage for two hundred hogs(o). By "meadow for two ploughs" was meant so much meadow as would support the oxen necessary for two ploughs(p). So in the ancient Saxon grants(q), and also in the Norman grants made prior to the statute of *Quia Emptores*(r), meadows and pastures are mentioned with other appurtenances as belonging to the land(s). So in the *Abbreviatio Placitorum* it is recorded that in Michaelmas term, 2 John, Walter de Witfeld recovers his seisin of twenty acres of pasture and forty acres of wood belonging to his free tenement(t).

(n) See those of the manor of Wimbledon.

(o) Bawdwen's Translation of Domesday, Middlesex, p. 25.

(p) Sir H. Ellis's Introduction to Domesday, vol. 1, pp. 103, 149, u. (4).

(q) Sharon Turner's Anglo-Saxons, vol. 2, pp. 555, 556.

(r) Stat. 18 Edw. I. c. 1.

(s) Mad. Form. Angl. No. 288, p. 178, No. 296, p. 182; No. 298, p. 182; No. 338, p. 267; No. 360, p. 274; No. 362, p. 275; No. 364, p. 276; No. 580, p. 328.

(t) *Abbreviatio Placitorum*, p. 27. See also Hil. 4 John, p. 37.

The land was measured amongst the Saxons by hides and yard lands (*virgatæ*), of which four usually went to a hide. ^{Hides and yard lands,} Thus the Saxon Chronicle, in speaking of Domesday, says, —“So very narrowly, indeed, did he commission them to trace it out, that there was not one single *hide nor yard land*, nay, moreover (it is shameful to tell, though he thought it no shame to do it), not even an ox, nor a cow, nor a swine was there left, that was not set down in his writ”(u). A hide land was supposed to be as much arable land as would maintain a family. It was accordingly called *familia* by the Venerable Bede(x), though in some rare cases the term “hide” appears to have been applied to pasture and wood(y). But amongst the Normans lands were measured by plowlands (*carucatæ*) and oxgangs ^{plowlands and oxgangs.} (*bovatæ*), terms exclusively applicable to arable land, a plowland being as much as a plough could till, and an oxgang as much as an ox-team could till(z). A writ for an oxgang of marsh was held ill, “because an oxgang is always of a thing which lies in tillage”(a). Though, as Lord Coke observes(b), “a plowland may contain a messuage,

(u) Sax. Chro. Anno 1085, p. 289, Thgram's edit. The learned translator puts “yard of land,” which he explains to be the fourth part of an acre; but the expression is *gýpte lander*, yard land, which comprised several acres, varying in different places. Gibson rightly translates the passage thus: “*ut ne unica esset hyda aut virgata terras*.” Gibson's Sax. Chron., p. 186.

(x) Co. Litt. 69 a; Sir H. Ellis's Introduction to Domesday, vol. 1, p. 145.

(y) Sir H. Ellis's Introduction to Domesday, vol. 1, p. 148.

(z) Ibid. vol. 1, p. 156. Lord Coke, however, says that an oxgang was as much as an ox could till.

(a) Fitz. Abr. tit. Briefs, 241. The learned editor of Co. Litt. erroneously supposes that the writ was held ill on account of the uncertainty of the term oxgang; Co. Litt. 69 a, n. (2). And he further

adds, “See infra, a like case as to the uncertainty of *virgata*.” The case referred to appears to be that mentioned by Lord Coke in Co. Litt. 69 a—“A fine shall not be received *de und virgata terra*, for the uncertainty: vide 39 Hen. VI. 8.” But on reference to the Year Book it will be found that all that was decided was, that if a grant was anciently made of two virgates of land, on which two messuages have since been built, and part of which has since been converted into meadow, pasture and wood, the deed of grant must be pleaded in its terms, and the land demanded by the names appropriate to its present state of messuage, land, meadow, pasture and wood, the change being alleged. And in Sheppard's Touchstone, p. 12, *bovata*, and *virgata* are both mentioned amongst the proper terms to pass land by fine.

(b) Co. Litt. 69 a.

wood, meadow, and pasture, because that by them the plowman and the cattle belonging to the plow are maintained.” Gain and tillage were synonymous terms, *gaigner* signifying to till and *gainure* tillage. So beasts of the plough and cattle, which tilled and manured the land, were exempt from distress if any other could be found (c). And the ancient law with respect to tithe corresponded with this state of things. As a rule, every kind of produce was titheable. But no tithe was payable for grass used for the agistment or feeding of any cattle or sheep employed in the tillage or manurance of arable land within the parish; because the parson thereby got better tithes from the arable land (d). The pasture land was thus treated by law as subservient to the arable, and excused from tithe on the ground that it tended to make the arable land more profitable.

The Statutes of Merton and Westminster the second.

The statutes of Merton (e) and Westminster the second (f) treat tenants entitled to common appendant as a well-known class, the former speaking of them as feoffees, the latter as tenants or the lord's men. Both statutes relate only to common of pasture, that being a right, and the only right, always given by the law; and the latter statute expressly excepts common of pasture claimed by anyone in any other manner than of common right he ought to have, “*alio modo quàm de jure communi habere deberet*.” By these statutes the lord was enabled to improve his wastes, provided he left sufficient common for the tenants.

The lord's freemen.

The tenants exercising these rights of common were often called generally the lord's freemen. Thus in the reign of King John, *Amauricus Comes Hebraicarum* grants to a tenant as to his freeman, for his service and homage, a yard land, with a messuage to the same land belonging, and with all its appurtenances, to hold of him and his heirs to the tenant and his heirs at a certain rent; “and I will,” the

(c) Com. Dig. tit. Distress (C); 2 Inst. 132.

(d) 1 Eagle on Tithes, 289, 290.

(e) Stat. 20 Hen. III. c. 4.

(f) Stat. 18 Edw. I. c. 46.

And see stat. 3 & 4 Edw. VI. c. 3, s. 2.

deed proceeds, "that he shall have common in my town of *M. like my other freemen (sicut alii liberi mei homines)* in woods and waters and pastures and ways and paths" (*g*). So in the second year of the reign of King John, the *men of Prunhull*, in Sussex, complain that the abbot of Battle and the abbot of Robertsbridge had levied a fine in the King's Court of a certain marsh which belonged to their free tenement in Prunhull, of which their predecessors were seised as of right in the time of Henry the king's father (*h*). So the *men of Ormadan*, to the number of forty, release to the abbess and convent of Dora their rights of common in certain lands (*i*). So, in the reign of King Henry III., Richard de Stoches grants to the monks of Bruerne certain lands in frankalmoigne, and also grants them common of pasture *with the other men* of the same fee (*k*). The men are mentioned generally, not as certain particular tenants, but the whole of the tenants of that fee or feud.

The fact that when "land" is spoken of in legal instruments arable land is always understood, unless the contrary appears, shows the importance attached to arable land, and tends to prove that the tenants of the arable lands in a manor were not merely certain individual tenants, but were in ancient times all the tenants as a class. When every tenant held and lived upon arable land, nothing could be more natural than that by the word "land," arable land should be primarily understood. Land means arable land.

The exceptions to the rule, that common appendant is the common law right of every free tenant of a manor, depend simply on this, that the special nature of certain subjects of tenure renders common appendant inappropriate to their enjoyment. Common appendant was the right which every free tenant of arable land had, by the common law, to depasture upon the lord's wastes all cattle subservient to the tillage and manurance of such land, namely, horses, kine Exceptions.

(*g*) Mad. Form. Angl. No. 303, p. 184.

(*h*) Abbreviatio Placitorum, p. 82.

(*i*) Mad. Form. Angl. No. 153,

p. 83.

(*k*) Mad. Form. Angl. No. 341, pp. 258, 259. See also No. 361, pp. 274, 275.

Commonable beasts. and sheep, which are thence called commonable beasts; and the number of beasts to be put upon the common was as many as were *levant* and *couchant* upon the land—that is, as many as the land was capable of maintaining on it by its produce through the winter. Common appendant could not be claimed in respect of a house without any curtilage or yard; for it was truly said, “beasts cannot be rising and lying down on a house, unless it be on the top of the house”(l). But a curtilage was supposed to belong to a house or cottage unless the contrary appeared (m). So common appendant could not be claimed in respect of ancient meadow or pasture; for the meadow and pasture itself helped to depasture the beasts which tilled and manured the arable land to which it belonged; and meadow and pasture did not require beasts to till it. The tenant who had pasture land of his own would not require to put so many cattle on the lord’s wastes; and by custom common appendant might be limited to a certain number of beasts(n). But the fact that the tenant might feed his beasts elsewhere did not destroy his claim to common appendant(o); and even if arable land was converted into meadow or pasture, the right to common appendant still remained, for the land might be ploughed up again(p). In some cases the meadow land was periodically allotted to the owners of the arable land in the manor, giving rise to an exceptional estate of inheritance peculiar to meadow land. The freehold was not in the lord, but in the tenants(q); and a feoffment by the tenant of the allotment for the time being allotted to him was sufficient to pass his interest in the whole of the mead(r). Meadow or pasture land is then, from its nature,

No common for a house.

No common for ancient meadow.

Lot mead.

(l) 2 Brownlow, 101; *Scholes v. Hargreaves*, 5 T. Rep. 46; *Benson v. Chester*, 8 T. Rep. 396.

(m) Com. Dig. tit. Common (B).

(n) 1 Rol. Abr. tit. Common (G), 4; Com. Dig. tit. Common (B).

(o) Year Book, 17 Edw. III. 34 b; 1 Rol. Abr. tit. Common (D), 8.

(p) *Tyrringham's case*, 4 Rep.

38 b, 37 b; *Carr v. Lambert*, Law Rep., 1 Exch. 168.

(q) *Walden v. Bridgewater*, Cro. Eliz. 421; Moor, 302; Co. Litt. 4 a; Rol. Abr. tit. Estate (C). See also *Archæologia*, vol. 88, p. 275; vol. 85, p. 470; *Case and opinion of Sir Orlando Bridgman*, 12 Jur., N. S., pt. 2, p. 103; and see *Pite v. Brownlow*, 1 Keble, 876.

(r) Co. Litt. 48 b.

an exception to the ordinary rule which gives common appendant of common right to every freehold. But such exceptions as these do but illustrate and confirm the rule, that of common right every freeholder is entitled to common appendant in the lord's wastes.

The authorities above cited from Williams's Saunders, Willes's Reports, and Comyns' Digest(s), are strictly in accordance with the principles above stated. And Lord Coke's Commentary on the Statute of Merton, which is cited at length by the Court in the judgment in *Lord Dunraven v. Llewellyn*(*t*), so far from shaking these authorities, evidently confirms them. The Court, however, says, that common appendant is not a common right of *all tenants*, but belongs only to each grantee, before the statute of *Quia emptores*, of *arable land* by virtue of his individual grant, and as an incident thereto, and is as much a *peculiar right* of the grantee as one derived by express grant or by prescription. But the principle that common appendant is not a peculiar right, but the common right of all tenants, is not only asserted by the authorities above mentioned, and consistent with the language of the legislature and of ancient documents, but it has produced doctrines of law which are undeniable, and which turn solely on the distinction that this kind of common is of common right, whilst other kinds are not. These doctrines are two. First, because common appendant is of common right, therefore a man need not prescribe for it(*u*). Lord Coke, who lays down this doctrine, had previously said that appendants are ever by prescription(*x*). Mr. Hargravé, in his note, reconciles the two doctrines thus: that "as appendency cannot be without prescription, the former always *implies* the latter; and, therefore, if one pleads common appendant it is unnecessary to add the usual form of prescribing"(*y*). In other words, common appendant is not a peculiar right

Common appendant need not be prescribed for.

(*s*) *Anto*, p. 632.

(*t*) *Anto*, p. 630.

(*u*) Co. Litt. 122 a; Year Book, 21 Hen. VI., 10 a; Fitz. Nat.

Brev. 179. n. (*δ*).

(*e*) Co. Litt. 121 b.

(*y*) Co. Litt. 122 a, n. (2) *Jenkin v. Fivian*, Popham, 201.

Common
appendant
shall be
apportioned.

Tyrringham's
case.

belonging to each grantee, but a common right belonging to all, and so well known to the law as such, that it is sufficient in pleading merely to mention its name, without entering into a more minute description. Had it been a peculiar right belonging to each grantee, it would have been necessary to set it out, the tenant claiming that he, and all those whose estate he had, from time immemorial used to place so many beasts of such a kind upon such a common. In this respect common appendant resembles the custom of gavelkind and borough English, which are known to the law and need not be particularly described, whereas any other customary mode of descent requires to be particularly stated (z). Secondly, "If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, *because it is of common right*; but not so of a common appurtenant, or of any other common of what nature, soever" (a). Here common appendant is distinguished from all other kinds of common, on the simple ground of its being of common right or a right given by the law. *Tyrringham's case* (b) turned on this distinction. The tenant there lost his common by claiming it as annexed to meadow and pasture: whereby was understood *ancient* meadow and pasture, to which, as we have seen (c), common cannot be *appendant*. Common may, however, by a grant or prescription, be *appurtenant* to meadow and pasture; and such in this case it was held to be. The owner of part of the land over which the common was claimed, purchased the premises in respect of which it was claimed, and then demised them to the plaintiff, who put in two cows into the residue of the land over which the right of common had existed. The defendant, who was the farmer of the owner of this land, with a little dog drove out the cows; and it was held that he was justified in so doing. By the union of part of the land wherein the common was to be had with the premises in respect of which it was to be had, the entire right of common was destroyed, because it was merely common

(z) Bac. Abr. tit. Customs (H).

(a) Co. Litt. 122 a.

(b) 4 Rep. 36 b.

(c) *Ante*, p. 638.

appurtenant. "Forasmuch as the Court resolved that the common was appurtenant *and not appendant* and so *against common right*, it was adjudged that by the said purchase all the common was extinct" (d). Common appurtenant is against common right because it depends upon a special grant, either expressed or implied from long usage; and the law accordingly allows it to fail altogether whenever it cannot be exercised in its integrity. But common appendant, being of common right, a right common to every freeholder, is favoured by the law, and allowed to be apportioned on the union of the tenements in respect of which it is claimed with part of the lands over which the right is exercised. Had the common been *appendant* in *Tyrringham's case*, it is clear that the Court would have held the plaintiff justified in putting in an apportioned number of cattle on the residue of the lands over which the right of common originally existed.

Common
appurtenant
is "against"
common
right.

These considerations would probably be of themselves sufficient to show that the proposition laid down in books of authority, that common appendant is the common law right of every tenant of freehold lands, is as accurate as any general proposition can be, and is not to be explained away into a number of distinct and peculiar grants, made only to certain tenants individually. The Court in *Lord Dunraven v. Llewellyn* assumes as a fact that such grants were actually made in the case before it, according to the explanation given by Lord Coke. And in many cases it may be taken as historically true that such grants were made. But rights of common were far more important in ancient times than they are at present (e), and in many places in England they appear to have existed long before the feudal rules of tenure were introduced by the Normans. Lot meads, in particular, were of Saxon or German rather than of Norman origin. And there is reason to believe that the rights of

(d) 4 Rep. 38 a.

(e) See Mr. Beale's suggestive Essay on Commons Preservation, Essays, p. 109; Abbreviation Pla-

citorum, Mich. 4 John, p. 36; Trin. 4 John, p. 40; Easter, 7 & 8 John, p. 51.

Wales.

A change of a somewhat similar nature appears to have taken place in the principality of Wales. The land in dispute in the case of *Lord Dunraven v. Llewellyn* was situate in the county of Glamorgan in Wales. Wales, as is well known, was conquered by King Edward the First, who by the *Statutum Walliæ*, 12 Edw. I., sometimes called the Statute of Rhuddlan, subjected a great part of it, principally the northern portion, to English law (*m*). Before this time large tracts of land had doubtless been given to Englishmen, who vanquished the natives and took their lands. But the rest of Wales was governed by its own laws and customs, of which copies and translations were published in the year 1841, under the direction of the Commissioners of Public Records. In one of these it is thus provided:—
 “Three things that are not to be done without the permission
 “of the lord and his court: building on a waste, ploughing
 “on a waste, and clearing wild land of wood on a waste; and
 “there shall be an action for theft against such as shall do
 “so, because every wild and waste belongs to the country and
 “kindred in common, and no one has a right to exclusive
 “possession of much or little of land of that kind” (*n*).
 Again, it is said that “every habitation ought to have a
 “bye road to the common waste of the ‘trev’ or vill” (*o*).
 So an oak, a birch or a wych elm could not be cut without the permission of the country and lord (*p*); but any person might take fuel from a decayed or hollow tree (*q*). As land was inalienable, and descended equally amongst all the sons, the landowners in the same place were probably in most cases of kin to one another. Hume says in his *History of England* (*r*), speaking of the time of the conquest by Edw. I. — “The rude and simple manners of the natives, as well
 “as the mountainous situation of their country, had made

(*m*) See 1 Bl. Comm. 93, 94; Hale's Hist. of Common Law, pp. 248 *et seq.*; 2 Reeves's Hist. Eng. Law, ch. 9, p. 92.

(*n*) *Cyvreithiau Cymru*, Welsh Laws, bk. 18, ch. 2, No. 101, p. 655, fol. edit. by Record Commissioners.

(*o*) Welsh Laws, bk. 9 ch. 25,

No. 8, p. 525, fol. edit. by Record Commissioners.

(*p*) Ibid. bk. 18, ch. 2, No. 238.

(*q*) Ibid. bk. 10, ch. 7, No. 9; bk. 18, ch. 2, No. 102.

(*r*) Vol. 2, pp. 240, 241, 8vo. edit. 1802.

"them entirely neglect tillage and trust to pasturage alone for their subsistence." This statement, however, appears too sweeping. The wars in which they were then engaged were more probably the cause of their neglect of tillage. Many of their ancient laws relate to agriculture; their lands appear to have been cultivated by a system of co-tillage, the land when ploughed being divided into twelve parts—the first for the ploughman, another to the irons (*s*), another to the driver, another to the plough, and the rest to the owners of the eight oxen that formed the team (*t*). Co-tillage of waste is elsewhere said to be one of the immunities of an innate Cymro or Welshman (*u*), and without co-tillage it is gravely said no country can support itself in peace and social union (*x*). No trace appears, so far as the author has been able to discover, of any mere right of common of pasture, according to the notions of English law. At the time of the conquest, Llewellyn, the native prince, granted four "cantrevs," or four hundred trevs or vills, to the king, besides other lands; and in the document by which this grant was effected the king grants that all holding lands in the four cantrevs and other lands aforesaid which our lord the king holds in his own hands (except those to whom the king shall refuse to do this favor), shall hold them as freely and fully as before the war they were accustomed to hold, and shall enjoy the same liberties and customs which before they were accustomed to enjoy; so that they, who held of the prince, for the future shall hold those lands of the king and his heirs by the accustomed services (*y*). This grant was substantially carried out by the Statute of Wales before mentioned. But the alteration made by the introduction of writs similar to those then used in England of necessity led to a system of law conformable

(*e*) Compare 1 Ellis's Introduction to Domesday, p. 266, where it appears that certain tenants were bound to furnish irons for the lord's ploughs.

(*t*) The Venedotian Code, bk. 8, ch. 24, par. 8, p. 158, fol. edit. by Record Commissioners.

(*u*) Welsh Laws, bk. 13, ch. 2,

No. 83, p. 651, fol. edit.

(*x*) Ibid. bk. 13, ch. 2, No. 46, p. 638.

(*y*) *Articulorum pacis cum rege Angliæ ratificatio per Llewellynum principem Walliæ*, A. D. 1277, Rymer's *Fœdera*, vol. 2, pp. 88—90.

Writ of novel
disseisin of
common of
pasture.

to those writs. Amongst other writs specially introduced by the statutes, was the writ of novel disseisin of common of pasture. This writ, as given by the statute, is in the following form: "A. complains to us that B. and C. unjustly and without judgment disseised him of common of pasture, which belongs to his free tenement in such a vill, or another if the case requires it, after the peace proclaimed in Wales in the twelfth year of our reign" (z). This form of writ is similar to that given in Fitzherbert's *Natura Brevium* (a), and "lieth," as he says, "where a man hath common of pasture appendant or appurtenant to his manor, or house or land, which he hath for term of life, or in fee simple or in fee tail; if he be disturbed of his common, so that he cannot take it as he ought to do, he shall have an assize of novel disseisin thereof." A Welshman, therefore, who had been disturbed in his enjoyment of the common wastes, would have had no remedy but to sue out this writ.

The remedy
ascertained
the right.

Thenatureoftheremedyascertained to an English lawyer the nature of the right. The common now belonged to the tenement. The refined distinctions between appendant and appurtenant are not noticed in the writ, and were probably the work of a later age. But here was an incorporeal tenement only, belonging to a corporeal one. The writ, as Fitzherbert remarks, does not say that the claimant is disseised of his freehold, as was done in the case of land, but only of his common of pasture *belonging to his freehold* (b). Here was an end of any claim to the soil of the waste. All the tenants who had been accustomed to put their cattle on the waste had their rights defined more accurately than before, but narrowed also to fit the definition. This appears to have been the actual origin of common appendant in most parts of the principality of Wales; and if this be so, that right, in that country at least, has had its origin, not in a number of actual separate grants made by the lord to cer-

(a) P. 866 of fol. edit. by Record Commissioners.

(a) Vol. 2, p. 179.

(b) Fitz. Nat. Brev. vol. 2, p. 179.

tain tenants, but in the adaptation of the ancient rights of the freeholders as a class to the remedies prescribed by English law.

The county of Glamorgan, in which the lands in dispute in the case of *Lord Dunraven v. Llewellyn* were situate, does not appear to have been comprised in the grant made by Prince Llewellyn to King Edward I. (c). The lordship of this county appears to have been acquired by the Crown from Anne, Countess of Warwick, whose daughter married Richard, Duke of Gloucester, afterwards Richard III., King of England. Anne, Countess of Warwick, was a descendant of one Robert Fitzhamon, (a great lord and kinsman of William the Conqueror,) who acquired the lordship of Glamorgan by conquest from the Welsh, in the fourth year of the reign of King William Rufus, and who gave the castle and manor of Ogmores to William de Londres, knight, in reward for his services (d). And by a statute of the reign of King Henry VIII. (e), it was provided that after the feast of All Saints then next coming, justice should be ministered and executed to the king's subjects and inhabitants of the said county of Glamorgan, according to the laws, customs and statutes of the realm of England, and after no Welsh laws, in such form and fashion as justice was ministered and used to the king's subjects within the three shires of North Wales. This statute preserved the equal descent amongst all the sons then prevalent in Wales (f), which, however, was abolished by a subsequent Act of the same reign (g).

County of Glamorgan not granted by Llewellyn.

Conquered by Robert Fitzhamon.

Subjected to the laws of England.

In the case of *Lord Dunraven v. Llewellyn*, the lord who claimed the land in dispute as part of the waste tendered, as

(c) See an interesting article on the political geography of Wales by Henry Salusbury Milman, Esq., in the *Archæologia*, vol. 38, p. 19.
 (d) Stradling's Winning of Glamorgan from the Welsh, printed in Caradoc of Llancarvan's History of Wales, A. D. 1774, pp. xxiii., xxvi., xxix., xxxi.
 (e) Stat. 27 Hen. VIII. c. 26, s. 14.
 (f) Stat. 27 Hen. VIII. c. 26, s. 85.
 (g) Stat. 34 & 35 Hen. VIII. c. 26, ss. 91, 128.

Modus.

we have seen, evidence of reputation—that so it was considered by the commoners. This evidence was rejected, and the commoners were not considered as a body or class, because certain tenants only—namely, the tenants of arable lands—have by law a right to common appendant. If, however, the dispute had been between the rector of the parish and an occupier of arable land, with respect to a parochial modus payable in lieu of great tithe, evidence of reputation would have been clearly admissible (*h*). And yet the question would have been one which did not concern every occupier of land in the parish, for the occupier of pasture land paid no great tithe. The tithe of agistment of pasture was a small tithe only (*i*). This exception, however, arising as it did from the nature of the subject of occupancy, did not prevent the other occupiers from being treated as a class. So in the case of common appendant, the exceptions which arise from the nature of certain holdings should not prevent the claimants, who all claim under one common title—namely, a right given by the law itself—from being considered as a class of persons, with respect to whose rights evidence of reputation is admissible.

Custom.

If the commoners who claimed common appendant for their commonable beasts had claimed by the custom of the manor a right to put on the waste beasts not commonable, such as geese and pigs, evidence of reputation would have been admissible on the ground that a *custom* was in dispute (*k*). But such evidence is admissible in the case of a custom solely on the ground that a custom affects a class or body of persons in a particular place (*l*). Can it be said that the commoners are less a class when the custom of the manor coincides with the common law, which is the general custom of the realm, than when it differs from it?

Extinguishment of rights.

It may be said that common appendant at the present

(*h*) *White v. Lisle*, 4 Mad. 214, 225.

(*i*) 1 Eagle on Tithes, 44.

(*k*) *Damerell v. Protheroe*, 10 Q. B. 20; *Prichard v. Powell*, 10

Q. B. 589, 603, as explained in *Lord Dunroven v. Llewellyn*, ante, p. 681.

(*l*) *Jones v. Robin*, 10 Q. B. 681, 583, 620, 635.

day is comparatively rare, that many such rights have now become extinguished, and, that, supposing a single right to remain in a manor, ought evidence of reputation to be given in support of it? The answer is, that this depends upon the manner in which the claimant frames his claim. He may choose to rely on his continuous enjoyment of the right of common in respect of his tenement, or he may claim the benefit of the provisions, with liability to the limitations, of the Prescription Act (*m*); but he will not then be able to avail himself of the former exercise of similar rights in respect of other tenements holden of the same manor. If, however, he claim his common as appendant, there seems no reason why, in relying on a general right, he should not have the benefit of evidence of reputation as to similar rights once existing but now extinct. Reputation is admissible as to the boundaries of a manor, and none the less though the manor as such has ceased to exist (*n*). The cesser, therefore, of any general right ought not to prevent the admission of evidence of reputation as to its former existence. The cases as to customs afford an analogy. If all the copyholds but one, parcel of a certain manor, should become extinct, the tenant of that one may, if he pleases, allege a customary right of common as belonging to that tenement only (*o*); but in that case he cannot adduce evidence of the enjoyment of a similar right by other tenants of the same manor (*p*). He must prove the custom as he alleges it (*q*). He may, however, if he pleases, allege the right as belonging by custom to all the customary tenements of the manor (*r*), and in that case evidence as to the other tenements will be admissible in his behalf; but at the same time he will expose his claim to be met by evidence relating to any other tenement in the manor standing in the same situation as his own (*s*). Customs.

(*m*) Stat. 2 & 3 Will. IV. c. 71, ante, p. 537.

(*n*) *Steel v. Prickett*, 2 Stark. 488; *Doe d. Moleworth v. Sleeman*, 9 Q. B. 298; and see *Barnes v. Mawson*, 1 Mau. & Sel. 77.

(*o*) Bac. Abr. tit. Copyhold (E); *Foston and Crachrood's case*, 4 Rep. 81 b.

(*p*) *Wilson v. Page*, 4 Esp. 71.

(*q*) *Dunstan v. Treviser*, 5 T. Rep. 2.

(*r*) See *Potter v. North*, 1 Wms Saund. 346, 348; 1 Lev. 268.

(*s*) 1 Scriv. Cop. 597, 8rd edit.; *Cort v. Birkbeck*, 1 Doug. 218, 219, 228; *Freeman v. Phillips*, 4 Mau. & Sel. 486, 495.

For these reasons the author is of opinion that the case of *Lord Dunraven v. Llewellyn* was, on the point in question, wrongly decided. There was another point decided, namely this, that evidence of actual exercise is not essential to the admission of evidence of reputation. With this decision the author has no fault to find.

APPENDIX (G).

Referred to, pp. 447, 449.

THE Manor of } A General Court Baron of John Freeman
Fairfield in } Esq. Lord of the said Manor holden in and
the County of } for the said manor on the 1st day of Janu-
Middlesex. } ary in the third year of the reign of our
Sovereign Lady Queen Victoria by the Grace of God of
the United Kingdom of Great Britain and Ireland Queen
Defender of the Faith and in the year of our Lord 1840
Before John Doe Steward of the said Manor.

At this Court comes A. B. one of the customary tenants of
this manor and in consideration of the sum of £1000 of law- Considera-
ful money of Great Britain to him in hand well and truly tion.
paid by C. D. of Lincoln's Inn in the county of Middlesex
Esq. in open Court surrenders into the hands of the lord of Surrender.
this manor by the hands and acceptance of the said steward
by the rod according to the custom of this manor All
that messuage &c. [*here describe the premises*] with their Parcels.
appurtenances (and to which same premises the said A. B.
was admitted at the general Court holden for this manor
on the 12th day of October 1838) And the reversion and
reversions remainder and remainders rents issues and profits
thereof And all the estate right title interest trust benefit Estate.
property claim and demand whatsoever of the said A. B. in
to or out of the same premises and every part thereof To
the use of the said C. D. his heirs and assigns for ever
according to the custom of this manor.

Now at this Court comes the said C. D. and prays to be Admittance.
admitted to all and singular the said customary or copy-
hold hereditaments and premises so surrendered to his use
at this Court as aforesaid to whom the lord of this manor

by the said steward grants seisin thereof by the rod To
Habendum. HAVE AND TO HOLD the said messuage hereditaments and
premises with their appurtenances unto the said C. D. and
his heirs to be holden of the lord by copy of court roll at
the will of the lord according to the custom in this manor
by fealty suit of court and the ancient annual rent or rents
and other duties and services therefor due and of right
accustomed And so (saving the right of the lord) the said
Fine £50. C. D. is admitted tenant thereof and pays to the lord on
such his admittance a fine certain of £50 and his fealty is
respited.

(Signed) John Doe Steward.

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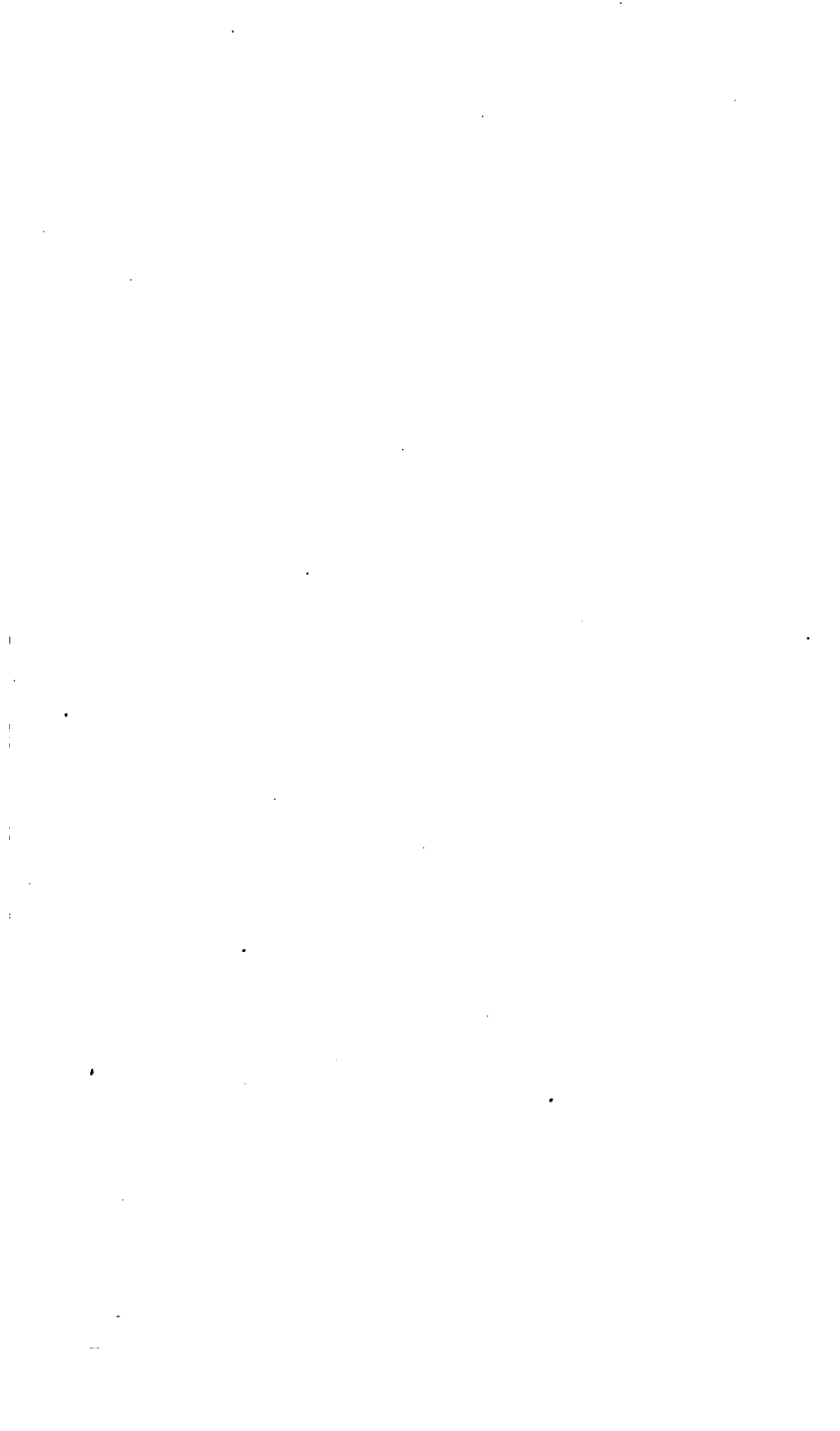
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